

Missouri Attorney General's Opinions - 1972

Opinion	Date	Topic	Summary
1-72	Jan 7		Opinion letter to Mr. Charles O'Halloran
2-72	Jan 14	ELECTIONS. ABSENTEE BALLOTS.	The list of the names of applicants for absentee ballots posted by the election authority in a conspicuous place accessible to the public at the entrance of the office of the election authority should include the post-office address to which the ballot is to be sent, the street address in the application for an absentee ballot and the ward or precinct number given by the applicant.
3-72	Jan 19	BONDS. LIBRARIES. CITIES, TOWNS & VILLAGES. CONSTITUTIONAL LAW.	A municipal library district has authority to issue general obligation bonds for the purchase of grounds or the erection of public library buildings or the improvement of existing buildings when authorized by a vote of two-thirds of the qualified electors of the district voting thereon.
4-72	Feb 1	LABOR. MEDIATION BOARD.	Missouri State Board of Mediation is not precluded from mediating dispute in industry subject to federal labor relations statutes, pursuant to Section 295.080, RSMo 1969, unless Federal Mediation and Conciliation Service actually assumes jurisdiction by proffering its services.
6-72			Withdrawn
7-72	Jan 5	ANTI-TRUST.	Arrangements among insurance companies to effectuate the price or any part thereof of competitive bids submitted by automotive repair shops is an unlawful restraint of trade in violation of Sections 416.020 and 416.040, RSMo 1969. However, any arrangement between <u>an</u> insurance company and <u>an</u> automotive repair shop whereby the former requires the latter to afford it discounts on specified work is not violative of Sections 416.020, 416.030, or 416.040, RSMo 1969, absent an arrangement among insurance companies to effectuate such a practice. Also, any arrangement among insurance companies to limit competitive bidding on automotive repair to only those automotive repair shops which agree to pre-conditioned limits on their competitive bid is violative of Sections 416.030 and 416.040, RSMo 1969, as an unlawful restraint of trade.
8-72	May 16		Opinion letter to Mr. Dexter D. Davis
9-72	Feb 9		Opinion letter to the Honorable Maurice Schechter
10-72	Jan 19	ROAD DISTRICTS.	A road district organized under the provisions of Sections 233.320 to

		ROADS & BRIDGES.	233.445, RSMo 1969, may issue bonds pursuant to Section 233.345, RSMo 1969, for the purpose of construction of a maintenance building for road machinery and equipment of the district.
12-72	Mar 20	SCHOOLS. TAXATION (SCHOOLS). EXCEPTIONAL CHILDREN.	Under subsection 3 of Section 167.151, RSMo 1969 (providing that a nonresident taxpayer must receive credit on tuition charged his child in an amount equal to the tax paid to the school district), school taxes paid in prior years or delinquent taxes paid in the current year may not be used as a credit against tuition charges for the current year. Furthermore, exceptional children, as defined by Section 178.260, RSMo 1969, whose parents are nonresident taxpayers of a district, are entitled to “appropriate instruction” in accordance with subsection 2 of Section 178.260, RSMo 1969.
13-72			Withdrawn
15-72	Jan 10		Opinion letter to the Honorable J. Anthony Dill
16-72	Mar 6	CONSTITUTIONAL LAW. PENSION FUNDS. INVESTMENTS.	Trustees of pension fund may make investments authorized by statutes without being restricted by constitutional limitations on investments by political corporations or subdivisions of the state.
17-72	Feb 15	COUNTIES. TOWNSHIPS.	Upon a third class county becoming a second class county, pursuant to Chapter 48, RSMo 1969, the alternative form of government, i.e., township organization, if previously adopted, automatically ceases to exist.
18-72	Mar 28	SCHOOLS. TEACHERS.	1. Under Section 168.126, RSMo 1969, a board of education need not give a probationary teacher ninety days notice prior to April 15 of its intention not to rehire the teacher because of incompetency in order to lawfully refuse to renew that probationary teacher’s contract for the next school year; 2. The time periods in Sections 168.116 and 168.126, RSMo 1969, should be computed on the basis of calendar days excluding the first day and including the last in accordance with Section 1.040, RSMo 1969.
19-72	Mar 8		Opinion letter to Mr. Joseph Jaeger, Jr.
20-72	Jan 7	LIBRARIES.	The governing boards of county, city-county and municipal libraries are vested with the administrative authority of such libraries and are not under the direction of the officers or governing bodies of such cities or counties.
21-72	Mar 10	SCHOOLS. JUNIOR COLLEGES. CONSTITUTIONAL LAW.	A junior college district in Missouri is an institution of higher education supported by public funds, as that term is used in Section 144.040.2, Senate Bill No. 72, Seventy sixth General Assembly; and Section 144.040, Senate Bill No. 72, Seventy-sixth General Assembly, which

		TAXATION (SALES AND USE).	does not exempt institutions of higher education supported by public funds from collecting sales tax on retail sales made by them, is constitutional. Therefore, it is our opinion that every junior college district must collect state sales tax on retail sales it makes after September 28, 1971.
22-72	May 22	BANKS. RULES AND REGULATIONS.	Rules and regulations proposed by the Commissioner of Finance providing that state banks and trust companies may purchase securities of a corporation carrying on a project which is predominantly service, community or public in nature when such purchase has been authorized by the Comptroller of the Currency as a proper investment for national banking associations are a valid exercise of his rule making authority and may be enacted if approved by the State Banking Board.
23-72	Feb 1	ROADS & BRIDGES. STATE HIGHWAYS. OUTDOOR ADVERTISING. CONSTITUTIONAL LAW.	1. The State Highway Commission may not utilize state road or highway fund moneys to defray the cost of the administration of a system of permits for the regulation of outdoor advertising. 2. The adoption of the permit system by the State Highway Commission is mandatory under Section 226.550, RSMo Supp. 1971. 3. Regulations for a permit system for outdoor advertising need not be adopted by the State Highway Commission and filed with the Secretary of State prior to such system's becoming effective. 4. Section 226.550, RSMo Supp. 1971, provides that permits be issued on a one-time basis. 5. Permits are specifically required only for the outdoor advertising specified in Section 226.520(5), RSMo 1969. Pre-existing signs that come within this provision are subject to permit regulation. Other pre-existing and non-conforming signs, subject to removal under Sections 226.560 and 226.580, RSMo 1969, need not obtain permits. 6. Section 226.550, RSMo Supp. 1971, refers to subparagraph (5) of Section 226.520, RSMo 1969. Therefore, outdoor advertising located in unzoned commercial or industrial areas, as defined and determined pursuant to Sections 226.500 to 226.600, RSMo 1969, is required to have a permit.
25-72	Mar 30		Opinion letter to Mr. James Flanagan
26-72	Apr 4	LEVEES. LEVEE DISTRICTS. DRAINAGE DISTRICTS.	The St. John Levee and Drainage District, a circuit court drainage district of New Madrid and Mississippi Counties, Missouri, has statutory authority to give assurances to the Department of Army as are required by the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.
27-72	Feb 14		Opinion letter to the Honorable J. Anthony Dill
28-72			Withdrawn
30-72	Jan 7	PAROLE.	(1) Section 195.220, S.C.S.H.C.S.H.B. No. 69, 76th General Assembly

		NARCOTICS. CRIMINAL LAW. CRIMINAL PROCEDURE. CONTROLLED SUBSTANCE.	(RSMo Supp. 1971, 195.221), as it concerns the granting of parole from a state correctional institution of anyone who is convicted of selling, giving, or delivering a controlled substance as defined by newly enacted Chapter 195, affects only those persons sentenced pursuant to such chapter after the effective date of its passage. (2) Such section does not affect the administrative function of the Department of Corrections in reference to Section 216.355(1), RSMo. (3) An individual under supervision of the Board of Probation and Parole who was sentenced to the State Department of Corrections for selling, giving, or delivering a controlled substance pursuant to Chapter 195 is not to be given credit for parole time as time toward service of his sentence for application of the three-fourths rule, Section 216.355(1), RSMo 1969.
31-72	May 9		Opinion letter to the Honorable Joe A. Johnson
32-72	Feb 1	ELECTIONS. POLLING PLACE. CRIMINAL LAW. CORRUPT PRACTICES.	The boundaries of a "polling place" are determined by the perimeter of the area actually occupied by the election personnel, supplies, and equipment of the place at which the voters cast their ballots. Where a room is fully occupied, the walls of the room define this perimeter. Where less than the total area of an enclosure is occupied, the perimeter of the area actually occupied defines the boundaries.
33-72	Feb 29	PLANNING COMMISSION. COOPERATIVE AGREEMENTS.	A regional planning commission organized under the provisions of Sections 251.150, RSMo 1969 et seq., is advisory to the governmental units in the region and does not have authority to exercise the legislative functions of local government although the participating municipalities may, under Sections 89.010, RSMo 1969 et seq., adopt planning and zoning as recommended by the commission. Such a regional planning commission has no authority to enter into an agreement with municipalities to enforce municipal codes.
34-72	Feb 14		Opinion letter to the Honorable William S. Brandom
36-72			Withdrawn
37-72	Feb 25		Opinion letter to Mr. John C. Vaughn
38-72	March 22	PENSIONS. RETIREMENT. PUBLIC RECORDS. STATE EMPLOYEES. STATE EMPLOYEES' RETIREMENT SYSTEM.	An individual who is not a member of the Missouri State Employees' Retirement System may inspect the records of the proceedings of the board of trustees of the system under the provisions of Section 104.480, RSMo 1969, for the purpose of determining how many members over the age of seventy years are employed by the state.
39-72	Jan 11		Opinion letter to the Honorable Robert S. Wiley
40-72			Withdrawn
41-72	Feb 2	COUNTY CLERKS.	Section 51.310, House Bill No. 484 of the 76th General Assembly,

		COMPENSATION. CONSTITUTIONAL LAW.	effective September 28, 1971, relative to compensation for certain county clerks for duties performed by them under Section 51.121, RSMo 1969, relating to a survey of voters, provides for an increase in compensation during the term of such officers in violation of Section 13 of Article VII of the Missouri Constitution and is not effective during such officers' terms.
42-72	May 12		Opinion letter to Mr. G. L. Donahoe
43-72	Feb 2	JURORS. GRAND JURY. CONSTITUTIONAL LAW.	Paragraph 2 of Section 494.020, RSMo Supp. 1971, renders any person who has served as a member of a grand jury panel prior to the effective date of the statute and within ten years next preceding his selection ineligible for service as a grand juror and such statute is constitutional.
44-72	Jan 7		Opinion letter to the Honorable Ray Lee Caskey
45-72	Feb 14	TAXATION (SALES & USE). CONSTITUTIONAL LAW. STATE COLLEGES. UNIVERSITIES.	The University of Missouri is subject to the imposition of a sales tax by a municipality on sales made by the University. If the University is delinquent only on payments owed to the city, the city must bring an appropriate action to collect the tax.
47-72	May 22	LIQUOR. LICENSES. CRIMINAL LAW. CONTRABAND.	The possession of "winemaking kits" fit for the use in the unlawful manufacture of intoxicating liquor, by business establishments or individuals who are not licensed by the state to manufacture intoxicating liquor, constitutes a violation of the Missouri Liquor Control law. However, this law does not prohibit the possession of winemaking equipment that is held for sale exclusively to businesses or individuals holding a state license to manufacture wine.
48-72	Mar 22	FIRE PROTECTION DISTRICTS.	1. A fire protection district in constitutional charter counties has authority to contract with another fire protection district for providing a joint fire and emergency dispatching service. The dispatching center which furnishes the dispatching service may hire a chief dispatcher but does not have authority to contract with a private corporation to furnish a chief dispatcher. 2. A chief dispatcher as required in Section 321.245, RSMo 1969, to be in charge of the operation and directly responsible to the management of the dispatching service is not required to be physically present twenty-four hours a day seven days a week. Such chief dispatcher must give his position his complete and undivided attention and may not engage in any other activities that would either consume any of the portion of the time required for him properly to function as chief dispatcher or which would in any respect interfere with his ability to perform his duties.

50-72	Jan 11	LAW ENFORCEMENT ASSISTANCE COUNCIL. EXECUTIVE ORDER. COMPENSATION. CONFLICT OF INTEREST.	The Governor of Missouri properly established the Missouri Law Enforcement Assistance Council by Executive Order. Such Council may properly determine the compensation and allowances of the Chairman.
52-72	Mar 1	SUNDAY. FIRE PROTECTION DISTRICTS.	The board of directors of a fire protection district may hold meetings and conduct its regular business and pass legally binding ordinances on Sunday.
53-72	Feb 2	TAXATION (INTANGIBLE). CORPORATIONS.	An account receivable held by a parent corporation evidencing an obligation of a subsidiary corporation, is intangible personal property as defined by Section 146.010, RSMo 1969. The proceeds received by the parent corporation constitute "yield" as that term is used in Section 146.010. Therefore, such parent corporation holding the legal or equitable title or beneficial interest in intangible personal property is subject to the property tax imposed by Chapter 146, RSMo.
55-72			Withdrawn
56-72	Sept 12	CHIROPRACTIC.	1. Under the provisions of Section 331.010, RSMo 1969, a chiropractor has authority to diagnose for the limited purpose of determining whether the particular treatment which he may legally render to a patient is proper treatment for the disease from which the patient is suffering. 2. A chiropractor is permitted to take and evaluate for diagnostic purposes only x-rays of the human spinal column and other parts of the human body for the limited purpose of determining whether the disease or ailment is one he can treat and to determine the proper treatment. 3. Section 331.010, RSMo 1969, prohibits chiropractors from employing any diagnostic tests or procedures which involve operative surgery or the administration or injection of any drug or medicine. Similarly proscribed are any procedures which are exclusively reserved to the fields of obstetrics, osteopathy, surgery or medicine.
57-72	Apr 17		Opinion letter to the Honorable Donald L. Manford
60-72	May 1	RESIDENCE. FIRE PROTECTION DISTRICTS.	A fire protection district may enact a rule or regulation requiring all future firemen to reside within the fire protection district.
61-72			Withdrawn
64-72	June 7	STATE TREASURER. LAND RECLAMATION COMMISSION.	The attached trust agreement between the State Treasurer and the Missouri Land Reclamation Commission covering moneys received by the Commission which are required as bond by Sections 444.772 and

			444.778, RSMo Supp. 1971, is not in violation of Section 13 or 15 of Article IV, Constitution of Missouri.
66-72	Mar 27	ELECTIONS. REGISTRATION. COUNTY CLERKS.	Section 51.121, RSMo 1969, requiring the county clerk to inspect voting precincts and present a report to the county court and certain party officials is not applicable to counties in which there is registration under either Chapters 114 or 116, RSMo 1969 but in which there is not registration as provided for by both chapters.
67-72	June 8		Opinion letter to Dr. Arthur L. Mallory
69-72	May 18		Opinion letter to the Honorable E. Richard Webber
70-72	Mar 8	CITIES, TOWNS & VILLAGES. CITY COLLECTOR. ELECTIONS.	A third class city with the Mayor-council form of government cannot abolish the office of collector and appoint a member of the city clerical staff or any other person to collect the city's taxes. Under Section 77.370, RSMo 1969, a third class city with Mayor-council form of government can abolish by ordinance the office of city collector only when the city contracts for the collection of taxes by the county collector or township collector.
71-72	Mar 16	MARRIAGES. MAGISTRATES. COMPENSATION. CONSTITUTIONAL LAW.	Section 24, Article V of the Missouri Constitution prohibits magistrates from receiving any compensation for solemnizing marriages.
73-72	Aug 17	TAXATION (EXEMPTIONS). CONSTITUTIONAL LAW.	1. Tangible personal property consigned to a warehouse from an out-of-state point acquires a tax situs in this state when it is warehoused for the convenience of the owner of the property; 2. Goods that are shipped from different out-of-state sources and combined together as one item in the warehouse before being forwarded to an out-of-state consignee do acquire tax situs at the warehouse; 3. The documentary proof required to prove that shipments are in transit are those documents that, in the particular business involved, accurately reflect the destination or eventual sale or consignment of the goods; 4. To secure the exemption provided by Section 137.093, RSMo, bills of lading do not necessarily have to show shipments from the point of origin through a Missouri county to the final destination outside the state on one and the same document; 5. A public warehouse owner, when authorized to do so by the owner of tangible personal property consigned to his warehouse, may show documentary proof of in-transit status in the same manner as the actual owner of the goods and claim an exempt status for the owner; 6. The federal import exemption that applies to uncrated goods is binding on county assessors.

75-72			Withdrawn
77-72	May 2	COUNTY CORONER. DEATH CERTIFICATE. DIVISION OF HEALTH.	A coroner in a county of the fourth class does not have the authority to prepare and submit a certificate of death to the local registrar when a death has allegedly occurred in the county but the body of the decedent has not been discovered.
78-72	May 25	TORTS. RECREATION. STATE PARK BOARD. SOVEREIGN IMMUNITY.	The state of Missouri acting through the Inter-Agency Council for Outdoor Recreation and the Missouri State Park Board, pursuant to Section 258.500, RSMo 1969, can agree under long-term contract with the United States to provide operation, maintenance and replacement of federally financed water control projects under the Federal Water Projects Recreation Act, 16 U.S.C.A., Sections 460I-12 and 13, and further to agree to reimburse the federal government in those projects; that under present law neither the Council nor the Park Board has the authority to agree to hold and save the United States free from damages due to the construction works.
79-72			Withdrawn
80-72	Feb 14	LEGISLATURE. LEGISLATORS. CONSTITUTIONAL LAW. ELECTIONS.	In order for a person to be eligible to file as a candidate for the office of state senator in a district in which such office will be filled at the November 7, 1972 general election, he must have been a resident of such district for one year prior to the November 7, 1972 election date.
81-72	Aug 2	CITIES, TOWNS AND VILLAGES. CITY OFFICERS. OFFICERS. TOWN TRUSTEES.	(1) A duly elected town trustee forfeits his office by moving from the town of his election; (2) until his removal from the board of trustees, a nonresident trustee is a de facto officer and his official acts and decisions are valid; and, (3) Section 80.230, RSMo 1969 provides that all vacancies in the board of trustees shall be filled by the remaining members of the board, the chairman or temporary chairman not voting except in case of a tie.
82-72	Mar 6		Opinion letter to Mr. James E. Schaeffner
87-72	Apr 11	ELECTIONS. CANDIDATES. COMMITTEEMEN. COUNTY CLERK.	A county clerk may refuse to place the name of a candidate he believes to be ineligible on the ballot and his action is subject to review by the courts. A person cannot have a residence for voting purposes only which is separate from his legal residence.
88-72	Mar 17		Opinion letter to the Honorable Donald J. Gralike
89-72	June 2	INSURANCE.	Neither Chapter 382, RSMo 1969, the Insurance Holding Companies Act, nor Section 375.320 of the Revised Statutes of Missouri 1969, prohibits a domestic insurer from operating a subsidiary which it acquired on March 23, 1971, and which subsidiary was organized and incorporated for the purpose of engaging generally in the automobile

			salvage business to dispose of salvage obtained by the insurer in the ordinary course of its insurance business.
90-72	Mar 17		Opinion letter to the Honorable Norman L. Merrell
92-72	June 7		Opinion letter to Mr. Robert E. Myers
93-72	May 19	TAXATION. ELECTIONS. COUNTY LIBRARIES.	After a county library district has been in existence for five years there is no limitation on the frequency with which the proposition to reconsider a library district's tax rate can be submitted to the people at the annual election. Said annual election is the annual school election held on the first Tuesday in April of each year.
94-72	May 16		Opinion letter to the Honorable Hayden Morgan
96-72	May 23	LAND SURVEYORS. COUNTY SURVEYOR. DEPUTY COUNTY SURVEYOR.	1. Only a person duly registered as a land surveyor under Chapter 327, RSMo 1969, is qualified to be elected to the office of county surveyor. 2. County surveyors who were qualified for the office when elected continue to hold the office for the remainder of their terms. 3. County surveyors have authority to appoint a duly registered land surveyor as a deputy to perform work as a land surveyor. 4. The state land surveyor may in his discretion require land surveys to be made by a local registered land surveyor when no registered county surveyor exists. 5. The only compensation the county surveyor in third and fourth class counties is entitled to receive for his services, whether the work is performed by him or his deputy, is the compensation provided by statute for the county surveyor. Any compensation to the deputy for his services must come from the county surveyor.
97-72	May 16		Opinion letter to Mr. Robert E. Myers
98-72	Mar 3		Opinion letter to Mr. Robert E. Myers
99-72	Apr 24	RAILROADS. POLICE. HIGHWAY PATROL. LICENSES.	Railroad police licensed by the Superintendent of the State Highway Patrol under the provisions of Section 388.600, RSMo Supp. 1971, are exempt from regulation of the St. Louis Board of Police Commissioners under the provisions of Section 84.340, RSMo 1969.
100-72	Sept 27		Opinion letter to the Honorable Robert H. Martin
101-72	Apr 18		Opinion letter to the Honorable Robert H. Branom
102-72	Mar 10		Opinion letter to the Honorable Lloyd J. Baker
103-72	May 19		Opinion letter to the Honorable Phil Snowden
106-72	Nov 9		Opinion letter to the Honorable Noel Cox
107-72	Apr 20		Opinion letter to the Honorable Floyd E. Lawson
108-72	Mar 22	RECORDER OF DEEDS.	A quit claim deed of release in full or partial satisfaction of a deed of

			trust is not subject to the user fee charge of one dollar by the recorder of deeds under Section 59.319, RSMo 1969.
109-72	June 7		Opinion letter to Mr. Henry Maddox
111-72	May 18	PENSIONS. TAXATION (INTANGIBLE). FIRE PROTECTION DISTRICTS.	A fire protection district located in a county of the first class may use the intangible personal property taxes it receives for pensioning of its firemen provided a majority of the qualified voters casting votes vote in favor of pensioning the salaried members of the fire department as provided under Section 321.600, RSMo 1969.
112-72	Mar 22		Opinion letter to the Honorable J. H. Frappier
114-72	July 3		Opinion letter to the Honorable R. J. Gordon
115-72	Mar 27		Opinion letter to the Honorable Thomas D. Graham
116-72	Apr 11	ELECTIONS. CANDIDATES. RESIDENCE. COMMITTEEMEN.	Under the provisions of Sections 120.770 and 120.340, RSMo 1969, a candidate for the office of committeeman who is not a resident of the ward for which he files is not eligible to have his name placed on the ballot.
117-72	Mar 27		Opinion letter to the Honorable Harold F. Reisch
122-72	Oct 11	TAXATION (SALES & USE). TAXATION (EXEMPTION).	The term "sale at retail" as defined by Section 144.010(8), RSMo 1969, does have the same meaning as the term "retail sale", used in Section 114.025. The term "retail sale" refers only to sales made by those engaged in business and not in transactions between individuals. When an individual trades his automobile to another individual the net difference after a trade-in is immaterial because the transaction is not a "retail sale" and the full value of the automobile purchased is used to calculate the tax.
123-72	May 10	ELECTIONS. REGISTRATION.	1. The requirement of one year's residence in the state as a condition to voting established by Article VIII, Section 2 of the Missouri Constitution and Section 111.021 RSMo 1969 is unconstitutional and void. 2. If the durational requirement of sixty days residence in a county, city or town as a condition to voting is held valid by the court in the case now pending in the United States District Court for the Western District of Missouri, such duration of residence will be required as a condition for voting at the November election but such duration of residence is not required in order to vote at the preceding primary election. 3. Any otherwise qualified person who is a resident of the City of St. Louis at the time of registration, regardless of the duration of his residence, may register to vote at the primary at any time prior to 5:00 p.m. on the 28th day preceding the primary election date as provided in Section 118.240, RSMo Supp. 1971. 4. The St. Louis City Election Board should register all residents of such city who apply

			before 5:00 p.m. on the 28th day preceding the August 1972 primary date if they have all other constitutional qualifications. Such persons are entitled to vote in the 1972 primary.
123a-72	July 19	ELECTIONS.	No person who establishes residence in Missouri 28 days or less prior to a primary or general election can register or vote in places where registration is required or vote in places where registration is not required at such ensuing primary or general election.
126-72	Oct 11	SHERIFFS. POLICE. COUNTIES. COUNTY OFFICERS. COUNTY CHARTERS.	The provisions of Section 66.250, RSMo (Senate Bill 389, 76th General Assembly, Second Regular Session) requiring appointed police officers in police departments in any county of the first class having a charter form of government to complete training or show completion of certain training courses in law enforcement or possess specified experience will apply to appointed officers in the sheriff's office of Jackson County when its Charter goes into effect January 1, 1973.
127-72	May 26	HIGHWAY PATROL. MOTOR VEHICLES. MOTOR VEHICLE INSPECTION.	Section 307.365(5), RSMo Supp. 1971, dealing with the refunding of moneys for vehicle safety inspection stickers of those inspection stations which discontinue operation, are suspended or revoked, is applicable only to those inspection stations which discontinued operation, were suspended or revoked, after the effective date of Section 307.365(5), RSMo Supp. 1971, the 28th day of September, 1971.
128-72	Aug 7	PENSIONS. RETIREMENT. CITIES, TOWNS & VILLAGES.	A city is prohibited by Section 70.615, RSMo from establishing a pension and retirement fund for employees who are other than policemen or firemen on an independent basis and not under the Lagers Retirement Plan (Sections 70.600 to 70.760, RSMo 1969, as amended) other than the Federal Social Security Old Age, Survivors and Disability Insurance program, as amended, unless the city has an assessed valuation of at least forty million dollars and does not now have a pension system for its officers and employees adopted pursuant to state law.
129-72	Sept 20	CONSTITUTIONAL LAW. INITIATIVE AND REFERENDUM.	Article XII, Section 2(b) of the Constitution of Missouri provides that constitutional amendments proposed by initiative shall be voted on at the next general election (more than four months from the date of filing) or at a special election called by the Governor prior thereto. The circulators of the petition have no power to designate the date of the election at which the amendment is to be voted. If an initiative petition contains an election date, such petition is ineffective to authorize the submission of the measure at a date later than the date specified in the petition.
131-72	Apr 20		Opinion letter to the Honorable James C. Kirkpatrick

132-72			Withdrawn
133-72	May 22	ELECTIONS.	Section 118.510, RSMo 1969 is valid.
134-72	May 17	ELECTIONS. CANDIDATES. SHERIFFS. COUNTY CLERK.	A person is not eligible for the office of sheriff unless he has resided in the county for more than one whole year next before filing for said office whether he files by declaration of candidacy or by nominating petition. The time for such filing is on or before five p.m. on the last Tuesday of April preceding the primary. The clerk of the county court may refuse the filing of such a person who does not possess the requisite residency eligibility.
137-72	Apr 25	NAMES. BALLOTS. ELECTIONS. CANDIDATES.	A candidate cannot have the nickname "Judge" appear before his name, or in parenthesis in his name, on the ballot because such nickname is a descriptive appellation.
139-72	Apr 27		Opinion letter to the Honorable Richard M. Webster
142-72	June 19	APARTMENT HOUSES. CITIES, TOWNS & VILLAGES. TAXATION (CITIES, TOWNS & VILLAGES).	A third class city cannot levy a business license tax upon apartment buildings.
145-72	May 4		Opinion letter to the Honorable James C. Kirkpatrick
146-72	May 19	COUNTIES. COOPERATIVE AGREEMENTS.	Counties may cooperate with each other and expend county funds under the provisions of Section 70.210, RSMo 1969 et seq., within appropriate limitations, by becoming members of an association of counties for the purposes of research in the field of local government, providing training for county officials, providing information for the efficient operation of county government and supporting or opposing legislation affecting such counties.
147-72	May 4	GOVERNOR. LEGISLATURE. CONSTITUTIONAL LAW.	Senate Bill No. 488 of the Second Regular Session of the 76th General Assembly is unconstitutional because it authorizes the Senate and House of Representatives to determine, by resolution, the number of their officers and employees in excess of the limitations imposed by Article III, Section 17 of the Missouri Constitution.
148-72	Aug 22	TAXATION (CITIES, TOWNS & VILLAGES). POLITICAL SUBDIVISIONS. EARNINGS TAX.	School districts in St. Louis County, under the provisions of Section 92.350, RSMo 1969, must deduct the St. Louis City Earnings Tax from the wages and salaries of their employees who are residents of the City of St. Louis, and remit the amount withheld (less statutory allowances) to the St. Louis City Collector.
152-72	June 20	AMBULANCES. MOTOR VEHICLES.	Fire trucks and ambulances, whether publicly owned or privately owned, operated by a member of an organized fire department or

		FIRE DEPARTMENT. EMERGENCY VEHICLES. MOTOR VEHICLE EQUIPMENT.	ambulance association, may display lighted red lights, or, with a permit from the chief of the organized fire department or ambulance association, may display a flashing blue light when responding to an emergency call, and the operators of such vehicles may park irrespective of the provisions of Sections 304.014 to 304.026, RSMo 1969, with caution, disregard stop signals, speed limits, and regulations requiring parking and turning of vehicles in specified directions, but comply with all other traffic laws and regulations, and the operator of all other vehicles on a street or highway, shall yield the right-of-way when such vehicle approaches.
154-72	June 13		Opinion letter to the Honorable George W. Parker
156-72	June 30	BANKS.	For the purposes of Section 362.107.2(4), RSMo Supp. 1971, which establishes a minimum distance between a drive-in facility of a bank and a main banking house of another banking institution, the distance between the bank facility and the competing main banking house should be measured along the shortest and straight line from the building of the main banking house devoted to banking activity to the building of the facility devoted to the banking activities permitted to be conducted at a facility.
157-72	June 19		Opinion letter to Dr. Arthur L. Mallory
158-72	May 31		Opinion letter to Dr. Arthur L. Mallory
159-72	May 25		Opinion letter to the Honorable James C. Kirkpatrick
160-72	May 18		Opinion letter to the Honorable James C. Kirkpatrick
161-72	May 24		Opinion letter to the Honorable A. Basey Vanlandingham
165-72			Withdrawn
171-72	June 23	TAXATION (INTANGIBLE). CONSTITUTIONAL LAW.	House Bill No. 537 does not violate the provisions of Article X of the Missouri Constitution and is therefore not unconstitutional.
172-72	July 5	COUNTY HOSPITALS.	A county hospital organized under the provisions of Sections 205.160, RSMo 1969 et seq., has authority to furnish food at cost to certain "shut-ins".
173-72	Nov 8		Opinion letter to William G. Brooks
174-72	June 23		Opinion letter to Dr. Arthur L. Mallory
175-72			

175-72	June 21	ELECTIONS. POLITICAL PARTIES.	The American Party is not a “political party” on a statewide basis in Missouri and therefore cannot nominate presidential electors at a convention of such alleged party. It is the further opinion of this office that under Section 120.160, RSMo, a new political party can be formed and presidential electors nominated by filing the required petitions. Such petitions must be filed in the office of the Secretary of State no later than July 31 of even-numbered years.
176-72	Aug 7	CONVICTS. PRISONERS. PAROLE & PROBATION. INTERSTATE COMPACT.	1. A parole hearing may be had before officials of a receiving state pursuant to the Interstate Corrections Compact. 2. The Board of Probation and Parole of the State of Missouri may hold a parole interview or hearing in a state, other than Missouri, for an inmate sentenced to the Missouri Department of Corrections who has been transferred pursuant to the Interstate Corrections Compact. 3. The Director of the Department of Corrections may authorize the removal to the State of Missouri, for a parole interview or hearing, of an inmate who has been transferred to an institution without the State of Missouri pursuant to the Interstate Corrections Compact. 4. Parole interviews, or hearings, may be held before transfer for those inmates who are transferred to other states pursuant to the Interstate Corrections Compact.
178-72	June 6		Opinion letter to Mr. B. W. Robinson
179-72	June 6		Opinion letter to Mr. Clifford L. Summers
185-72	Sept 15		Opinion letter to Mr. Joseph Jaeger, Jr.
186-72	Oct 24	SCHOOLS. TEACHERS.	A Missouri state college or university, under Section 168.021, RSMo 1969, has the authority to issue the degree of bachelor of science in education without granting a life teaching certificate if the candidate does not present evidence of good moral character, as required by Section 168.031, RSMo 1969. The issuing authority's procedures for concluding that evidence of good moral character has not been presented should conform to recognized standards of fairness.
188-72	Nov 16		Opinion letter to Mr. Peter W. Salsich
189-72	July 21		Opinion letter to Mr. Clyde Burch
191-72			Withdrawn
192-72	Aug 16	OFFICERS. CITY OFFICERS. COUNTY OFFICERS. CITY ASSESSOR. COUNTY ASSESSOR. CONFLICT OF	1. A person whose name is written in on a ballot at the general election for city assessor in a third class city who receives a majority of the votes cast is elected city assessor. 2. The county assessor in a county of the third class can also hold the office of city assessor in a third class city.

		INTEREST.	
193-72	Nov 9		Opinion letter to the Honorable William H. Bolinger
195-72	Aug 1		Opinion letter to the Honorable William J. Esely
196-72	June 23		Opinion letter to Dr. Arthur L. Mallory
197-72	July 21	DOGS. ANIMALS. COUNTY OPTION DOG TAX.	The county dog license fund established under the local option dog tax law (Sections 273.040 to 273.180, RSMo) shall be used only for the purpose of compensating persons who have suffered loss or damage through injury or killing by dogs of any livestock or poultry owned by them and located in said county at the time of such injury or killing.
198-72	July 21	TAXATION. METROPOLITAN DISTRICT. ST. LOUIS METROPOLITAN DISTRICT.	The Board of the Metropolitan Zoological Park and Museum District of the City of St. Louis and St. Louis County is not authorized to fix a permanent levy rate under Section 184.350, RSMo, for each of the three subdistricts of such District but is authorized to fix an annual rate varying as may be necessary within the prescribed statutory limits. Such District Board has no regulatory control over subdistrict funds and has no supervisory control over the subdistrict officers, employees or operations. Such Board must honor proper subdistrict vouchers.
199-72			Withdrawn
200-72	Aug 2		Opinion letter to Dr. Arthur L. Mallory
203-72	Dec 4	HATCH ACT. STATE EMPLOYEES.	The employees of a not-for-profit corporation organized for the sole purpose of promoting some functions of comprehensive health planning and to receive, via contract, federal funds which have been provided the State of Missouri by reason of 42 U.S.C.A. §246(a), are precluded from campaigning for elective office by the provisions of the Hatch Act for the reason that the agency concerned qualifies as "the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof" the employees of which are prohibited from actively participating in a political campaign by Title 5 U.S.C.A. §1052(a).
205-72	Aug 16	COUNTIES. COUNTY CHARTER. COUNTY CLASSIFICATION.	When a second class county which has adopted a charter form of government becomes a first class county it continues as a charter county.
206-72	July 24		Opinion letter to Mr. John T. Wiley
207-72	Nov 1	LIBRARIES. CITY LIBRARIES. COUNTY LIBRARIES.	A county library district which is a member of a regional library retains the power to levy taxes. When a city which contains a municipal library district annexes territory that is within a county library district, the

		TAXATION (CITIES, TOWNS & VILLAGES).	annexed territory remains in the county library district and is subject to taxation by the county library district and not to taxation by the city library district.
211-72	Aug 16	ELECTIONS. CORRUPT PRACTICES.	Section 129.300, RSMo 1969, which requires the identification of persons publishing, circulating or distributing certain printed matter relative to the candidacy of any person seeking nomination or election to any public office applies to pamphlets, circulars, handbills and similar printed matter but does not apply to yard signs.
212-72	Aug 21	CRIMINAL LAW. CRIMINAL PROCEDURE. PROBATION & PAROLE.	The cumulative period of both parole and probation of a person convicted of a misdemeanor, granted pursuant to Sections 549.071 and 549.101, RSMo, may not exceed the two year maximum set out in Section 549.071.
213-72	Aug 16	MINING. COUNTIES. COUNTY COURT. LAND RECLAMATION.	The county courts of third and fourth class counties who are conducting surface mining operations are not required to obtain permits under the provisions of Sections 444.760 through 444.786, RSMo Supp. 1971, because they are not "operators" as defined by Section 444.765(5).
216-72	July 25	SECRETARY OF STATE. INITIATIVE AND REFERENDUM. CONSTITUTIONAL LAW.	Secretary of State should refuse to issue his certificate when examination of initiative petition shows such petition does not contain a constitutional enactment clause, does not contain a title, does not contain sufficient signatures or if the petition contains more than one amended and revised article of the Constitution or one new article which contains more than one subject. He has no power to determine the validity or genuiness of signatures on such petitions.
218-72	July 26		Opinion letter to the Honorable Robert B. Paden
219-72	Oct 27	CITIES, TOWNS & VILLAGES. CONSTITUTIONAL CHARTER CITIES. PENSIONS.	The provisions of Section 70.610, RSMo, which authorize the governing body of a municipality to elect to come within the provisions of the Missouri Local Government Employees' Retirement System prevail over a charter provision of a constitutional charter city which requires that employee pension or retirement plans be submitted to the voters and that such a city may elect to come within the Local Government Employees' Retirement System by a majority vote of the governing body of such city without submitting the question to the voters.
221-72	Dec 13	HATCH ACT. CITY OFFICER. STATE EMPLOYEE.	The employment, by the Missouri Department of Community Affairs, of a city councilman of Jefferson City, who intends to run for re-election, to a position within the Department of Community Affairs, the salary of which would come entirely out of state funds, and which would be a position having no responsibility, either direct or supervisory, over the administration or disposition of any federal funds or any federally

			funded programs, would not be in violation of the Hatch Act, because said individual would fall within the exception of Title 5 U.S.C.A. Section 1501(4) (A) as "an individual who exercises no functions in connection with that activity," the activity in question being one financed in whole or in part by the federal government.
224-72			Withdrawn
227-72	Aug 14		Opinion letter to the Honorable Dan Harmon
228-72	Sept 19	DEAD BODIES. ANATOMICAL BOARD. STATE ANATOMICAL BOARD.	Only educational institutions that have a department of anatomy and in which human anatomy is investigated or taught to all students in attendance at such institution or to all students in attendance at a school or department of such educational institution come within the provisions of Section 194.120, RSMo 1969, and are entitled to receive human cadavers from the State Anatomical Board. Penn Valley Community College is not entitled to receive human cadavers from the State Anatomical Board.
231-72	Dec 1		Opinion letter to Mr. G. L. Donahoe
233-72	Oct 24	SCHOOLS. TEACHERS. TEACHER TENURE.	A teacher is a permanent teacher, under the provisions of Section 168.104(5) of the Teacher Tenure Act (Sections 168.102 to 168.130, RSMo 1969), if he has been employed as a full-time teacher in the same school district for four successive years and reemployed for a fifth successive year after previously having been employed two years or more by another school district.
234-72	Nov 10	LIBRARIES. COUNTY LIBRARIES.	A library district which desires to invest its funds in accordance with provisions of Section 182.800, RSMo Supp. 1971, should do so by drawing a warrant on a city or county treasury where such funds are deposited for the amount of the investment. The investment should be held by the board of trustees of the library district in the name of the district.
237-72	Aug 30		Opinion letter to the Honorable Vic Downing
246-72	Sept 19		Opinion letter to the Honorable Richard E. Martin
247-72	Nov 30		Opinion letter to the Honorable Don Owens
249-72	Sept 27		Opinion letter to Mr. Dexter D. Davis
250-72	Oct 16	POLITICAL PARTIES. PUBLIC EMPLOYEES.	Patronage employment within all levels of government in the state of Missouri is constitutionally impermissible where any of the following conditions attach to such employment: (1) Any requirement that political party membership or approval be obtained before consideration is afforded applicants for patronage positions or to assure job security in patronage employment; and, (2) Any

			<p>requirement that contributions of money, time or talent be made to a political party or personage before consideration is afforded applicants for patronage positions or to assure job security in patronage employment. Likewise, any other form or manner of restriction or qualification placed on patronage employment would be constitutionally impermissible upon a determination by a court of law that it infringes or denies any of the following protected rights: (1) The First Amendment's guarantee of free speech and political association; (2) The Ninth Amendment's guarantee that allows one to engage in varying forms of political endorsements and activities to advance a particular view; (3) The Fourteenth Amendment's protection against infringement of the right to have an equal chance to attain elective office; and, (4) The Fourteenth Amendment's protection against infringement of the right to have an equally effective voice in the management of government.</p>
253-72	Sept 12	GOVERNOR. CONSTITUTIONAL LAW.	The provisions of section 51, Article IV of the Missouri Constitution, requiring Senate confirmation of gubernatorial appointments, relates only to state executive branch officials.
254-72	Oct 17	ELECTIONS. NEWSPAPERS.	A county clerk can publish notices of primary and general elections under Sections 120.400 and 120.580, RSMo 1969, in any two newspapers published in the county when the newspapers published in the county do not represent both of the two major political parties.
256-72	Nov 1	LIBRARIES. NEPOTISM. COUNTY LIBRARIES.	A judge of the county court violates the prohibition of nepotism contained in Article VII, Section 6 of the Missouri Constitution if he participates in the appointment of a relative within the fourth degree of consanguinity to the board of trustees of the county library district.
257-72	Dec 22	LIBRARIES. CITY LIBRARIES. COUNTY LIBRARIES.	With respect to city-county library districts under the provisions of Section 182.291 (Senate Bill No. 583, 76th General Assembly, Second Regular Session): (1) "Fiscal year" as used in subsection 5 with respect to the merger for tax purposes refers to the tax year of the city; (2) The county library district fiscal year is the applicable fiscal year after the district is established; (3) Where the city and the county have the same name, it need not be repeated to properly identify the district and it is sufficient if the name is stated once identifying the district as a city-county library district.
258-72	Oct 2		Opinion letter to Honorable William E. Robinson
262-72	Oct 20	ELECTIONS. ABSENTEE VOTING. NOTARY PUBLIC.	A notary public or other officer acknowledging absentee ballot affidavits is prohibited from assisting persons in marking absentee ballots and from receiving compensation for acknowledging absentee ballot affidavits.

269-72	Dec 1	SCHOOLS. TUITION.	Article IX, Section 1(a), of the Missouri Constitution of 1945 forbids a school district from charging any fee to any resident student who wishes to enroll in any course offered for academic credit.
271-72	Oct 6	CHARTER COUNTIES. COUNTIES. POLICE. CONSTITUTIONAL LAW.	Neither the regular police officers of the Police Department of the City of St. Louis nor the reserve officers of such city appointed under the provisions of Section 84.175, RSMo (House Bill No. 1144, 76th General Assembly, Second Regular Session) are under the provisions of Section 66.250, RSMo (Senate Bill No. 389, 76th General Assembly, Second Regular Session) requiring certain training or experience of police officers in police departments in any county of the first class having a charter form of government.
272-72	Dec 11		Opinion letter to the Honorable J. William Holliday
273-72	Oct 4	ELECTIONS. COUNTY CLERKS. REGISTRATION. HOLIDAYS.	The Missouri statutes with respect to the close of voter registration which provide for different closing dates for such registration are valid. The General Assembly of Missouri can by statutory enactment provide for a uniform closing date for registration throughout the state. County clerks are not prohibited from opening their offices for registration on a legal holiday under Sections 114.080 or 116.030, RSMo 1969.
274-72	Oct 16		Opinion letter to the Honorable Ralph Combs
276-72	Oct 16	POLICE. RESIDENCE. ST. LOUIS CITY.	The City of St. Louis has no authority to require that officers of the police force of such city hired after a specified date reside within the city.
277-72	Oct 16	RESIDENCE. ELECTIONS. ABSENTEE VOTING.	(1) The St. Louis Board of Election Commissioners <u>should not</u> send absentee ballots listing the names of candidates for state and local offices (including Congressional candidates) to legal residents of St. Louis temporarily living outside Missouri who are not registered voters. (2) The St. Louis Board of Election Commissioners <u>must</u> send absentee ballots listing the names of Presidential and Vice Presidential candidates to legal residents of St. Louis temporarily living outside Missouri who are not registered voters.
280-72	Nov 20	FEES. COURT COSTS. CIRCUIT CLERKS.	With respect to the distribution of fees collected by the circuit clerk in civil and criminal cases under the provisions of Sections 483.530, 483.540 and 483.541 (House Committee Substitute for Senate Bill No. 496, 76th General Assembly, Second Regular Session) that: (1) Fifty percent of the fees earned and collected under Sections 483.530 and 483.540 go to the county and fifty percent to the director of revenue in the manner provided in Section 483.541; (2) Section 483.530 excepts from charge and collection the fees enumerated in such section in cases where the defendant is certified by the judge to be indigent and unable to pay; (3) Section 483.540 respecting fees in civil cases applies

			to juvenile court proceedings. Such fees are taxed under Section 211.281, RSMo, and whether collected from the county or from individuals fifty percent is to be paid pursuant to Section 483.541 to the director of revenue; (4) Section 483.540 respecting fees in civil cases applies to Uniform Support cases. Such fees may be taxed under Section 454.150, RSMo, and if collected from the county or from individuals fifty percent is to be paid pursuant to Section 483.541 to the director of revenue.
283-72			Withdrawn
284-72	Oct 25	NOMINATIONS. ELECTIONS. CANDIDATES. SECRETARY OF STATE.	With respect to the filing of nominations by party committees under the provisions of Section 120.550, RSMo to fill vacancies in the nominations for state representative and state senator: (1) The filing must be with the Secretary of State; (2) Telegraphic filing is not authorized under Section 120.550, RSMo.
287-72	Nov 9		Opinion letter to Mr. Jack K. Smith
289-72	Nov 3	ELECTIONS. BALLOTS. ABSENTEE BALLOTS.	Persons who have resided in Missouri for thirty days or more but less than one year are eligible to vote in person or by absentee ballot for President and Vice President in this state without being registered. No person who has resided in Missouri for more than one year, and who is not registered to vote, except a person who has been absent from his home for such period of time that it has been substantially impossible for him to register to vote in person, is eligible to receive any ballot for the November 7, 1972, election, in those areas of Missouri in which registration is required, except that in areas with local option registration (Chapter 114, RSMo 1969), no person who has lived in Missouri more than one year and is not registered may receive a ballot. A person not registered who has resided more than one year in an area of Missouri in which registration is required (other than an area having local option registration) can receive an absentee ballot for President and Vice President only when he has been absent from his home for such period of time that it has been substantially impossible for him to register to vote in person.
290-72	Dec 4		Opinion letter to Mr. Gary G. Sprick
291-72	Dec 21		Opinion letter to the Honorable Thomas D. Graham
293-72	Dec 13	PENSIONS. RETIREMENT. STATE EMPLOYEES.	An individual who is presently retired and receiving retirement benefits which were calculated by multiplying one percent of his average pay (not to exceed \$7,500 per year) during the five consecutive years of work when his pay was the greatest, times his years of creditable service, is not entitled to receive additional compensation under House Bill No. 1178, Second Regular Session, 76th General Assembly as a

			result of the change in the definition of average compensation in October of 1967.
294-72	Nov 6	ELECTIONS. ABSENTEE VOTING.	When votes are cast both for a deceased candidate and for his officially-designated successor in an election, the opposing candidate shall be declared elected if he receives more votes than were cast for both the deceased candidate and the successor candidate; the successor candidate shall be deemed elected if, not crediting him with votes for the deceased candidate, he receives more votes than were cast for the opposing candidate; and the election shall be declared void, if the opposing candidate receives more votes than the successor candidate but fewer votes than the total cast for the deceased candidate and the successor candidate. Straight party ticket votes for the party ticket which included the name of the deceased candidate shall be credited to the successor candidate as if the name of the successor had appeared thereon.
299-72	Nov 21	SHERIFFS. DEPUTY SHERIFFS.	Except for special or emergency deputy sheriffs appointed for a period not exceeding thirty days under provisions of Section 57.119, RSMo, deputy sheriffs can lawfully be appointed in a county of the second class only in the number fixed by the judges of the circuit court of such county and in the manner provided in Section 57.220, RSMo. A person holding an "honorary deputy sheriff's commission" that is one not issued under the provisions of Sections 57.119 or 57.220, RSMo, is not in contemplation of law a deputy sheriff and is not authorized to carry concealed weapons.
302-72	Dec 19	GOVERNOR. EXECUTIVE ORDERS. MERIT SYSTEM.	The Governor's Executive Order dated May 2, 1972, purporting to place certain employees of the Missouri Public Service Commission under the provisions of Chapter 36, the state merit system, is invalid.
304-72	Dec 22		Opinion letter to the Honorable Frank L. Mickelson
305-72	Dec 13	STATE EMPLOYEES. RETIREMENT. PENSIONS.	An employee of the State of Missouri who terminated such employment on July 31, 1957, then returned to employment by the state on January 13, 1969, who has since continuously remained in such employment, is not entitled to prior service credit for his state employment prior to July 31, 1957.
327-72	Dec 29	COUNTIES. COUNTY CLASSIFICATION.	A third class county which had an assessed valuation of more than \$70,000,000 and less than \$300,000,000, as determined by the State Tax Commission for the years 1967, 1968, 1969, 1970 and 1971, will become a second class county on January 1, 1973.
328-72	Dec 22	LIQUOR. SUNDAY SALES.	Section 311.298, RSMo 1969, applies to establishments licensed to sell 5 percent beer by the drink and such establishments can sell 5 percent beer by the drink on Sunday when December 31 falls on Sunday after

			1:00 p.m. and until the time which would be lawful on another day of the week.
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January 7, 1972

OPINION LETTER NO. 1
Answer by letter - Klaffenbach

Mr. Charles O'Halloran
State Librarian
Missouri State Library
308 East High Street
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This letter is in answer to your request for an opinion in which you ask:

"The State Library employs professional librarians. These individuals are generally possessed of graduate degrees in Library Science. The Commission has discussed the employment of these individuals on a contract basis. I believe that they would contemplate the employment of the professional librarian for periods of at least one year, with a contract between the individual and the library for his services during that year. Is there anything in the Missouri Statutes which would prohibit the State Library Commission using this kind of contract for its professional employees?"

While we find no express statutory prohibition it is our view that the making of the above specified contracts was not within the contemplation of the legislature. That is, although the legislature authorized the appointment of personnel by the State Librarian subject to approval by the Commission, Section 181.043, RSMo 1969, and provided that they be paid in the same manner as personnel in state departments and divisions, Section 181.047, RSMo 1969, there is no statutory authorization for such contracts and in our view none can

Mr. Charles O'Halloran

be implied. Public employment is not ordinarily the subject of bargaining or contract. Springfield v. Clouse, 206 S.W.2d 539 (Mo. 1947).

We thus conclude that the Commission does not have authority to enter into annual contracts stating terms and conditions of employment with professional librarians.

Very truly yours,

JOHN C. DANFORTH
Attorney General

ELECTIONS:
ABSENTEE BALLOTS:

The list of the names of applicants
for absentee ballots posted by the
election authority in a conspicuous

place accessible to the public at the entrance of the office of the
election authority should include the post-office address to which
the ballot is to be sent, the street address in the application for
an absentee ballot and the ward or precinct number given by the
applicant.

OPINION NO. 2

January 14, 1972

Honorable George W. Parker
State Representative, District 120
Room 202A Capitol Building
Jefferson City, Missouri 65101



Dear Representative Parker:

This is in answer to your request for an opinion which reads
as follows:

"Re 112.030, RSMo 1969 concerning the election
authority's instruction to post the list of
applicants for absentee ballots.

"The statute says, 'The list shall show also
the post-office address, street address, elec-
tion district or precinct number given by the
applicant.'

"Question: Should the election authority be
expected to provide the out-of-county address
for absentee ballot applicants who reside out
of the county?

"Comments: Presumably, most applicants from
out of town would necessarily include their
mailing address out of town because their bal-
lot goes to them by mail. It would seem to me
that it should be public information as to
where out of town the applicant lives. List-
ing the precinct or election district is im-
portant in counting his vote. . . but for an
out of town resident this would probably be
the address in the county where he lived
prior to moving out of the county and would
have no current significance, except for iden-
tifying which precinct to credit his vote to."

Honorable George W. Parker

Section 112.030, RSMo 1969, provides in part as follows:

"1. Application for an absentee ballot may be made on a blank signed by the applicant, to be furnished by the election authority, or may be made in writing by first class mail addressed to the election authority and signed by the applicant. Immediately upon receipt of each application, within the time and in the manner provided, the election authority shall make a list of the names of the absentee voters whose applications for ballots have been received, and shall cause the list to be immediately posted in a conspicuous place accessible to the public at the entrance of the office of the election authority. The list shall show also the post-office address, street address, election district or precinct number given by the applicant.

"2. The election authority shall not furnish a ballot to any person who is not lawfully entitled to vote. If the applicant for a ballot is entitled to receive the ballot, the election authority shall send an official ballot in a separate envelope addressed to each absentee voter by certified mail with return receipt or shall deliver in person an official ballot to any applicant applying in person at the office of the election authority."

It can be seen from the provisions of Section 112.030 above quoted that applications for absentee ballots must be made on a form furnished by the election authority or by the applicant in writing and that the election authority when it receives such application must deliver the absentee ballot to the individual in person or must send the official ballot to such individual by certified mail.

We are enclosing Opinion No. 356 rendered December 7, 1964 to Frank C. Ellis which holds that the delivery of such absentee ballots must be at the place where the voter either permanently or temporarily resides. In cases where a ballot is mailed to a person casting an absentee ballot in one county because he is a permanent resident of such county but who is temporarily located in another county or another state under the holding in such opinion the ballot must be mailed to him at the address at which he is then located.

It is our view that the requirement of posting of a list in a conspicuous place accessible to the public at the entrance of the

Honorable George W. Parker

office of the election authority means that such list shall show the post-office address, the street address and the election district or the precinct number given by the applicant. We believe it apparent that the statute does not confer upon the election authority the power to include in the list only the post-office address or the street address or the ward number or the precinct number. The statute itself makes it clear that the list is to include as separate items the street address, the post-office address and either the ward number or the precinct number. The reason that an alternative is given as to ward or precinct number is that wards are found only in incorporated municipalities. It is clear that the reason for posting such a list is so that interested members of the public may make such investigation as they deem proper in order to determine whether or not the individuals applying for absentee ballots are persons eligible to receive and cast such absentee ballots. All information necessary for a determination should be included in the list and this would include both the street address and ward or precinct number listed by the individual applying for the ballot in addition to the post-office address to which he requests that the ballot be sent.

We believe that the holding above made is conclusively shown by the provisions of Section 11472, RSMo 1939, which provided an affidavit and application form for an absentee ballot and which included, as does Section 112.030, the provision that the list should show "the post-office address, street address, ward or precinct number given by such applicant." In the affidavit and application for ballot form provided in such statute the applicant was required to list his street address and he was also required to give the "post-office address to which ballot is mailed." This we believe constituted a clear legislative interpretation of the meaning of the phrase "the post-office address, street address, ward or precinct number given by such applicant" and that the statute required that both the post-office address and street address be in the list posted by the election authority. The specific statutory form for affidavit and application for absentee ballot was deleted from such section when such section was amended, Laws Mo. 1943, p. 526, providing that application could be made upon a form furnished by the county clerk, board of election commissioners or other officers charged with the duty of furnishing ballots or in writing by first class mail addressed to the election authority and signed by the applicant but the phrase "the post-office address, street address, ward or precinct number given by such applicant" was unchanged. It follows therefore that in making the list of applicants for absentee ballots the election authority must include the post-office address to which the ballot is to be sent, the street address in the application and the ward or precinct number given by the applicant.

Honorable George W. Parker

CONCLUSION

It is the opinion of this office that the list of the names of applicants for absentee ballots posted by the election authority in a conspicuous place accessible to the public at the entrance of the office of the election authority should include the post-office address to which the ballot is to be sent, the street address in the application for an absentee ballot and the ward or precinct number given by the applicant.

The foregoing opinion which I hereby approve was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 356
12-7-64, Ellis

BONDS:

LIBRARIES:

CITIES, TOWNS & VILLAGES:

CONSTITUTIONAL LAW:

A municipal library district has authority to issue general obligation bonds for the purchase of grounds or the erection of public library buildings or the improve-

ment of existing buildings when authorized by a vote of two-thirds of the qualified electors of the district voting thereon.

OPINION NO. 3

January 19, 1972

Mr. Charles O'Halloran
State Librarian
Missouri State Library
308 East High Street
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This is in response to your request for an opinion regarding whether or not municipal library districts have the authority to issue general obligation bonds for the purpose of constructing library buildings and facilities within their districts.

Municipal library districts were created by Senate Substitute for House Bill No. 120 of the 73rd General Assembly. The purpose of this bill, specified therein, was:

" . . . to eliminate taxation of certain property which is now being taxed for the support and maintenance of a county library district and a city library or a public library supported and maintained by a school district and as of the effective date of this act, to permanently fix the geographical boundaries of both city and county library districts, and to preserve the territorial integrity of both city and county library districts."

One of the sections of S.S.H.B. No. 120 became §182.480, RSMo 1969 which states in part as follows:

" . . . the furnishing of free public library services to residents of the district, and the district shall be known as 'The city of . . . Municipal Library District', and each

Mr. Charles O'Halloran

such district shall be a political subdivision of the state of Missouri and a body corporate with all the powers and rights of like or similar corporations, and as of the effective date of sections 182.130 and 182.480 to 182.510, all of the area or territory which is hereby included within a municipal library district shall be excluded from the boundaries of any existing county library district, and all of the taxable property located in the municipal library district shall only be subject to taxation by the municipal library district and shall hereafter not be subject to taxation by the county library district; . . ."

Section 182.480, RSMo 1969, established a "Municipal Library District" as "a political subdivision of the state of Missouri and a body corporate with all the powers and rights of like or similar corporations." Sections 182.480 through 182.510 governing "Municipal Library Districts" do not provide specific authorization for a "Municipal Library District" to issue general obligation bonds for the purpose of constructing library buildings and facilities within their districts and such specific authorization is not provided elsewhere within Missouri statutory law. It is, therefore, necessary to see if bond issue authorization can be found in the Missouri Constitution.

Article VI, Section 26(b), Constitution of Missouri, provides:

"Any county, city, incorporated town or village or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes, except that a school district by a vote of two-thirds of the qualified electors voting thereon may become indebted in an amount not to exceed ten per cent of the value of such taxable tangible property."

This section speaks in terms of political subdivisions being authorized to issue bonds. The critical question is whether it is a self-executing provision or must be given life through the passage of enabling legislation.

The Missouri Supreme Court, in State ex rel. City of Fulton v. Smith, 194 S.W.2d 302 (Mo. 1946), outlines the general law pertaining to the self-executing nature of constitutional provisions, l.c. 304:

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" . . . 'One of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles, but that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment.

* * * Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation. In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.' (Citations omitted). . . ."

In State ex rel. Clark County v. Hackmann, 218 S.W. 318 (Mo. 1920), the Court determined that Article X, Section 12, Constitution of Missouri 1875, was a self-executing provision as it related to the authority of Clark County to incur an indebtedness to raise money for the satisfaction of preexisting valid county indebtedness. Article X, Section 12, Constitution of Missouri 1875, read in part as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness, . . ."

This section clearly parallels Article VI, Section 26(b), Constitution of Missouri 1945, although the authority to incur indebtedness is extended in a negative manner. In this regard, the Court stated l.c. 324:

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"Whilst section 12, art. 10, inhibits counties from contracting debts 'exceeding in any year the income and revenue provided for such year,' yet in addition to this inhibition is a grant of authority to contract in excess of the yearly income and revenue, with 'the assent of two-thirds of the voters thereof voting at an election to be held for that purpose.' . . ."

In concluding that Section 12 was self-executing and a grant of authority without the need of a legislative enactment, the Court stated l.c. 324:

". . . Under section 12 of article 10 of the Constitution counties have the power, by elections held for that purpose, to create debts for county public purposes. Note the authority is by elections. The requisite vote is prescribed, but the details of the election are not otherwise prescribed. Whilst section 12 of article 10 is a clear limitation on the power to create debts, and the power to increase taxes, it is likewise a grant of power to do both in a certain way and within a prescribed limit. There is no question of the limit in this case, because the debt is within the limit. The certain way is fixed, and that is by a vote of the people. The grant or right to determine the question by a vote of the people is fixed by this constitutional provision. . . ."

In State ex rel. Gilpin v. Smith, 96 S.W.2d 40 (Mo. 1936), the Court was again faced with making a decision as to the self-executing nature of Article X, Section 12, Constitution of Missouri 1875. The Court held that, l.c. 41:

"On the authority of the case of State ex rel. Clark County v. Hackmann, supra, we hold that section 12 of article 10 of our State Constitution is a self-enforcing grant of power permitting a county to incur indebtedness for a county public purpose if authorized by two-thirds of the voters of the county voting at an election on such proposition, if such indebtedness be within the amount permitted by the Constitution."

In both the Hackmann and Smith cases, the Court considered whether the purpose for which the indebtedness was to be incurred

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was a proper county purpose. Under Article VI, Section 26(b), Constitution of Missouri, no reference is made to the purpose of incurring indebtedness. It is, however, clear that Section 182.480, RSMo 1969, has created a political subdivision and given to it the purpose of "the furnishing of free public library services to residents of the district."

Several recent cases have dealt with the self-executing constitutional provision issued. In State v. Holman, 355 S.W.2d 946 (Mo. banc 1962), the municipality of Charleston contended that Section 23(a) of Article VI, Constitution of Missouri, was self-executing and authorized Charleston to issue general obligation bonds for industrial development purposes. In State v. Holman, supra, the Court concluded from the express wording of Section 23(a) that it was not self-enforcing and with regard to Section 23(a) observed, l.c. 950:

" . . . It grants to the city the privilege of creating indebtedness by popular vote in addition to four other such authorized purposes found in Article VI, but, in so doing, it also expressly limits that privilege to the purchase, construction, extension or improvement of plants to be leased or otherwise disposed of pursuant to law for manufacturing and industrial development. Relator tacitly concedes that, until the enabling act here in question became effective, there was no adequate and complete law whereby the city could proceed to incur indebtedness to be secured by the city's general obligation bonds for the very definitely limited purposes set forth in §23(a). . . ."

In Petition of Monroe City, 359 S.W.2d 706 (Mo. banc 1962), the Court held that Article VI, Section 27, Constitution of Missouri applicable to revenue bonds for industrial development purposes was not self-executing. The Court used the same basic rationale that was used in the Charleston case, supra.

'The instant situation is closely analogous to State v. Hackmann, supra, and State v. Smith, supra. Municipal library districts would look to Article VI, Section 26(b), Constitution of Missouri, for authority to issue bonds and Section 26(b) closely parallels the relevant portion of Article X, Section 12, Constitution of Missouri 1875, which the Supreme Court found to be self-executing.

The instant case is, on the other hand, clearly distinguishable from the Charleston and Monroe City cases. Sections 23(a)

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and 27 both involve potential grants of authority which at the time the cases were decided, were new and innovative, and as the Court stated in the Monroe City case, supra, l.c. 711:

" . . . We are unhesitatingly of the opinion that the mere expanding of §27 by the simple device of wedging (so to speak) words embodying such new concept into or between provisions previously interpreted as being self-executing does not compel that same interpretation as to the new matter so inserted. Nor are we willing to say that it should be so interpreted, this for the reason that this innovation by way of municipal financing of industrial projects is so new and untried, its possibilities so sweeping, and its operation and potentialities so utterly uncertain (and great) as to imperatively require statutory charting of its course. . . ."

In addition, Section 23(a) by it's language indicated the subject was referred to the legislature for action.

Section 26(b) of Article VI provides easily discernable guidelines within which the authority conferred can be regulated and said section obviously applies to political subdivisions such as "municipal library districts" authorized by Section 182.480, RSMo 1969.

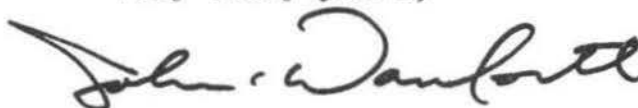
Opinion No. 148 rendered May 29, 1969, to Senator Jack E. Gant, which held invalid Section 182.105, RSMo 1969, which authorizes issuance of general obligation bonds by a county library district is hereby withdrawn.

CONCLUSION

It is the opinion of this office that a municipal library district has authority to issue general obligation bonds for the purchase of grounds or the erection of public library buildings or the improvement of existing buildings when authorized by a vote of two-thirds of the qualified electors of the district voting thereon.

The foregoing opinion which I hereby approve was prepared by my assistant, Alfred C. Sikes.

Very truly yours,



JOHN C. DANFORTH
Attorney General

LABOR:
MEDIATION BOARD:

Missouri State Board of Mediation
is not precluded from mediating dispute in industry subject to federal labor relations statutes, pursuant to Section 295.080, RSMo 1969, unless Federal Mediation and Conciliation Service actually assumes jurisdiction by proffering its services.

OPINION NO. 4

February 1, 1972

Honorable R. J. King, Jr.
State Representative, District 39
Room 202I Capitol Building
Jefferson City, Missouri 65101



Dear Representative King:

This official opinion is issued pursuant to your written request in which you ask questions as follows:

"A question has arisen as to whether the State Board of Mediation of Missouri as established by Chapter 295 of the Missouri Revised Statutes would be able to proceed in the manner set out in Section 295.080, with respect to a Labor dispute involving an investor owned electrical utility which is engaged in Interstate Commerce and which has properties in States other than Missouri, where the great majority of the employees are employed in Missouri and where the great majority of the Company's customers are also located in Missouri.

"The question is whether the State Board of Mediation can function, in view of the provisions of the Labor-Management Relations Act and Chapter 29 United States Code, Sections 171 through 182, establishing the Federal Mediation and Conciliation Service."

Section 295.080, RSMo 1969, provides as follows:

"1. Upon receipt of notice of any labor dispute between parties subject to this chapter, the [state] board [of mediation] shall require

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such parties to keep it advised as to the progress of negotiations therein.

"2. Upon application of either party to a labor dispute or upon its own motion the board may fix a time and place for a conference between the parties to the dispute and the board or its representative, upon the issues involved in the labor dispute and shall take whatever steps it deems expedient to bring about a settlement of the dispute including assisting in negotiating and drafting a settlement agreement.

"3. It shall be the duty of all parties to a labor dispute to respond to the summons of the board for joint or several conferences with it or with its representatives and to continue in such conference until excused by the board or its representative."

This provision represents a proper matter of public concern and it is constitutionally valid except to the extent that its operation may have been preempted by the various federal statutes governing labor relations. State ex rel State Board of Mediation v. Pigg, 244 S.W.2d 75 (Mo. banc 1951).

The Federal Mediation and Conciliation Service (hereafter FMCS) exists by reason of 29 U.S.C., Sections 171 through 182. Under 29 U.S.C., Section 173(a) FMCS is obliged to:

". . . assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation."

The relationship between FMCS and state mediation agencies is illustrated by the following provisions of 29 U.S.C.

". . . The Director [of FMCS] may establish suitable procedures for cooperation with State and local mediation agencies. . . ."
(Section 172(c))

"The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to

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mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. . . ." (Section 173(b))

The question of federal preemption is illuminated very clearly by these statutory provisions. FMCS has the authority to assume jurisdiction and to proffer its services in any labor dispute which in its judgment "threatens to cause a substantial interruption of [interstate] commerce." It is not obliged to proffer its services in any specific dispute. It might decide that no mediation was necessary or helpful, or it might believe that state or other mediative agencies could provide adequate service. The field is pre-empted, then, to the extent that FMCS decides to assume jurisdiction in a particular case.

FMCS may allow state agencies to perform the mediative function. It is expressly directed to do so if it concludes that a particular dispute has only a minor threatening effect. It may also establish procedures prospectively, by authority of 29 U.S.C., Section 172(c). It may decide whether or not to enter a particular dispute, after the dispute has arisen.

We do not believe that the State Board of Mediation (hereafter "State Board") is required to keep away from a particular dispute until the FMCS has announced a definite decision as to whether or not it will enter the dispute. Nothing in the federal statutes requires any specific permission. FMCS assumes jurisdiction by actually proffering its services. The State Board would not be interfering with federal authority by entering a dispute, for the reason that the federal authority could be asserted at any time through a proffer of services and the effect of the proffer would be to exclude the State Board from future action in the particular dispute.

The State Board, then, could assume jurisdiction and proceed in the manner set out in Section 295.080, in any labor dispute having substantial Missouri incidents. Its action would not be precluded by the fact that the industry in question is subject to the federal labor relations statutes, or by the fact that employees who do not work in Missouri may be involved. The State Board does not have to wait for federal clearance, although as a practical matter it might find it expedient to consult with FMCS to determine their attitude toward entering the dispute. The authority of the State Board would continue until FMCS actually assumed jurisdiction by proffering its services.

Under Section 295.080, the State Board may require the parties to keep it informed and may require them to appear at joint and

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several conferences. These provisions are only mildly coercive and we do not perceive any interference with the policy of the federal statutes. These statutes encourage resolution of disputes through mediation and conciliation.

We limit our opinion to action in mediation pursuant to Section 295.080. Substantial portions of Chapter 295 of the Missouri Revised Statutes, including highly coercive provisions, were held to be invalid in the light of federal law, in the case of Division 1287, Amalgamated Association v. Missouri, 374 U.S. 74 (1963). In State ex rel State Board of Mediation v. Pigg, *supra*, the Court held that the provisions of Chapter 295 relating to mediation were distinct and severable, and that as such they were constitutionally valid. This holding seems consistent with Amalgamated Association v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951), which the Supreme Court of Missouri relies on.

CONCLUSION

It is the opinion of this office that the Missouri State Board of Mediation may proceed in accordance with the provisions of Section 295.080, RSMo 1969, by requiring the parties to a labor dispute having substantial effects in Missouri to keep it informed of progress or to attend joint or several conferences, and by otherwise promoting the settlement of the dispute through conciliation and mediation. The authority of the State Board is not foreclosed by reason of the federal statutes, even though the dispute in question affects interstate commerce, unless and until Federal Mediation and Conciliation Service assumes jurisdiction by proffer of its services in the manner specified in 29 U.S.C., Section 173.

The foregoing opinion which I hereby approve was prepared by my special assistant, Charles B. Blackmar.

Very truly yours,



JOHN C. DANFORTH
Attorney General

ANTI-TRUST:

Arrangements among insurance companies to effectuate the price or any part thereof of competitive bids submitted by automotive repair shops is an unlawful restraint of trade in violation of Sections 416.020 and 416.040, RSMo 1969. However, any arrangement between an insurance company and an automotive repair shop whereby the former requires the latter to afford it discounts on specified work is not violative of Sections 416.020, 416.030, or 416.040, RSMo 1969, absent an arrangement among insurance companies to effectuate such a practice. Also, any arrangement among insurance companies to limit competitive bidding on automotive repair to only those automotive repair shops which agree to pre-conditioned limits on their competitive bid is violative of Sections 416.030 and 416.040, RSMo 1969, as an unlawful restraint of trade.

OPINION NO. 7

January 5, 1972

Honorable Donald E. Lamb
Prosecuting Attorney
Reynolds County
P. O. Box 52
Centerville, Missouri 63633



Dear Mr. Lamb:

This is in response to your request for an opinion on whether specified practices among insurance companies and between insurance companies and automotive repair dealers relating to the repair by the latter of the formers' insured automobiles constitutes practices inimical to the anti-trust laws of this state.

The facts as set forth in your opinion request are as follows:

"Several automobile repairmen in this county have complained to me concerning the practices followed by some insurance companies in the area. These companies have entered into an agreement or understanding with one of the automobile dealers in the area, whereby this dealer gives the insurance companies an across-the-board discount of 30% on all windshields replaced and a 10% discount on all parts. The other dealers have been informed by the insurance companies that, unless they give the insurance companies an identical discount, that these dealers will not even be invited to make competitive bids on repairs. A number of the

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dealers have refused to do this, with the result that they have not been invited to make competitive bids on the various repair jobs for the insurance companies. In addition, the insurance companies have been requiring their insureds to go only to the one repair shop which has agreed to give the insurance companies the aforementioned discount.

"The complaint of the remaining repair shops is, not that they are required by the insurance companies to submit the low bids in order to obtain a given job, but that they are not even given the opportunity to make a competitive bid in the absence of an overall agreement with the insurance companies to give the insurance companies the flat discount rate noted above."

Specifically, by your letter, you have inquired:

". . . whether such an agreement or arrangement by and between the insurance companies and any participating repair shop would be in violation of the provisions of the anti-trust laws of the State of Missouri, specifically Sections 416.020, 416.030 or 416.040, RSMo."

In the following opinion, this office accepts the facts as stated in your request. This office, itself, has no specific information as to the existence of those facts.

It is the opinion of this office that any "agreement, combination, confederation or understanding" among insurance companies to fix, stabilize or in any manner effectuate the price, i.e., competitive bid, or any part thereof, at which an insurance company, a member to such understanding, will allow its insureds' automobiles to be repaired by an automotive shop is a restraint of trade in violation of Section 416.020, RSMo 1969. The latter statutory section provides that any ". . . agreement, combination, confederation or understanding . . . to regulate, control or fix the price of . . . repair, . . . [is a] conspiracy in restraint of trade, . . ." The specific mention of repairs in Section 416.020 necessitates the conclusion by this office that the service exemption (see State ex rel. Star Pub. Co. v. Associated Press, 60 S.W. 91 (Mo. banc 1900) and State v. Green, 130 S.W.2d 475 (Mo. 1939)) from the Missouri anti-trust laws is not applicable to the factual situation presented in your opinion request. An agreement among competitors

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to "regulate, control or fix" prices is termed a horizontal arrangement and has, since the inception of this state's restraint of trade laws, been held violative of said laws. State ex rel. Crow v. Fireman's Fund Ins. Co., 52 S.W. 595 (Mo. banc 1899). Such horizontal combinations are illegal per se. State ex rel. Barrett v. Boeckeler Lumber Co., 256 S.W. 175 (Mo. banc 1923); State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co., 151 S.W. 101 (Mo. 1912); Reisenbichler v. Marquette Cement Co., 108 S.W.2d 343 (Mo. 1937). The United States Supreme Court in its interpretation of Section 1 (federal counterpart to Sections 416.010 and 416.020, RSMo 1969) of the Sherman Act (15 U.S.C. §7) has consistently held that price fixing is a per se offense. That is to say, its legality does not depend on a showing of unreasonableness, since price fixing is conclusively presumed to be unreasonable. United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956) and United States v. Container Corporation of America, 393 U.S. 333 (1969).

However, any business arrangement between an insurance company and an automotive repair shop whereby the latter agrees to afford the former specified discounts on designated work is not an unlawful agreement in restraint of trade under the factual situation depicted in your request. Such an arrangement is the prerogative of independent businessmen and does not violate Sections 416.020, 416.030 or 416.040, RSMo 1969.

It is the further opinion of this office that an "agreement, combination, confederation or understanding" among insurance companies to limit competitive bidding on automotive repair to only those automotive repair shops which agree to pre-conditioned limits on their competitive bids, i.e., the specific discounts as mentioned in your opinion request, is violative of Section 416.030, RSMo 1969. The latter section provides that any:

" . . . two or more persons engaged in buying . . . repair, . . . who . . . enter into, . . . any . . . agreement, combination, confederation, association or understanding to control or limit the trade . . . or to limit competition in such trade . . . for the reason that such other person is not a member of or party to such . . . combination, confederation, association or understanding, or shall boycott or threaten any person from buying or selling to any other person who is not a member of . . . [is] guilty of a conspiracy in restraint of trade, . . ."

Therefore, any arrangement among insurance companies by which they refuse to accept competitive bids from automotive repair shops on

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the former's insured automobiles, absent an agreement by the automotive repair shop to adhere to the insurance company's price-related concessions, is an illegal boycott of trade and violative of Section 416.030, RSMo 1969. See Walsh v. Association of Master Plumbers, 71 S.W. 455 (St.L.Ct.App. 1902); State ex rel. Barrett, supra; and Dietrich v. Cape Brewery & Ice Co., 286 S.W. 38 (Mo. 1926). Under Missouri's counterpart in the federal statute (Sherman Act, §1) group boycotts are illegal per se. See Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959).

Section 416.040, RSMo 1969, provides a further remedy of declaring:

" . . . arrangements, contracts, agreements, combinations or understandings . . . [which] lessen, or which tend to lessen, . . . trade, . . . or . . . which . . . increase, . . . or . . . tend to increase, the market price . . . to be . . . void; . . . "


Section 416.040, RSMo 1969, does provide the substantive test of lessening competition or increasing price and under such a standard would make this statutory proviso likewise applicable to those arrangements which the foregoing opinion has determined to be inimical to the anti-trust statutes of this state.

CONCLUSION

It is the opinion of this office that arrangements among insurance companies to effectuate the price or any part thereof of competitive bids submitted by automotive repair shops is an unlawful restraint of trade in violation of Sections 416.020 and 416.040, RSMo 1969. However, any arrangement between an insurance company and an automotive repair shop whereby the former requires the latter to afford it discounts on specified work is not violative of Sections 416.020, 416.030 or 416.040, RSMo 1969, absent an arrangement among insurance companies to effectuate such a practice. Also, any arrangement among insurance companies to limit competitive bidding on automotive repair to only those automotive repair shops which agree to pre-conditioned limits on their competitive bid is violative of Sections 416.030 and 416.040, RSMo 1969, as an unlawful restraint of trade.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Kermit W. Almstedt.

Yours very truly


JOHN C. DANFORTH
Attorney General

February 9, 1972

OPINION LETTER NO. 9
Answer by letter-Jones

Honorable Maurice Schechter
Senator, District 13
Room 427, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Schechter:

This letter is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

"In March 1970, you issued an opinion to Senator VanLandingham relating to additional compensation to teachers based upon life, health and other insurance furnished by the school district to the teacher. Your ruling stated such insurance was additional compensation, chargeable [sic] to the teachers fund and subject to the state income withholding tax.

"Senate Bill 270 of the 76th General Assembly, approved by the Governor eliminates the same being subject to state income [sic] tax, which also includes retirement plans.

"If such fringe benefits are income to the teacher, should such amounts be included in the total compensation for teachers retirement which is presently paid 8% by the teacher and 8% by the school district? If your ruling is in the affirmative, is there a specific formula in determining the amount of such compensation as generally the rates of insurance vary, based upon the age and sex of the individual, but are usually prorated and a lump sum paid by the employer, being the school district in this case."

Honorable Maurice Schechter

The Public School Retirement System of Missouri is provided for in Sections 169.010 through 169.130, RSMo 1969. The system includes all school districts in this state, except those in cities that had populations of four hundred thousand or more according to the latest census. Subsection 3 of Section 169.030, RSMo 1969, provides for member contributions to the Retirement System and reads as follows:

"The contributions of members of the retirement system shall be collected by their employers through appropriate deductions from pay checks. The total amount deducted from the pay checks of members during any school year shall equal such a percent of their salary rates as may be required by the contribution rate then in effect." (Emphasis added)

In addition, accumulated contributions of a member are defined in subsection 1 of Section 169.010, RSMo 1969, as follows:

"(1) 'Accumulated contributions' shall mean the sum of the annual contributions a member has made to the retirement system through deductions from his salary, plus interest compounded annually on each year's contributions from the end of the school year during which such contributions were made;" (Emphasis added)

Senate Bill No. 270 was passed by the 76th General Assembly and signed by the Governor. This was an act to repeal Section 143.100, RSMo 1969, relating to income tax and to enact in lieu thereof one new section relating to the same subject. Specifically, subsection 7 of Section 143.110, RSMo 1969, now provides as follows:

"7. The amount to be included in the gross income of an employee attributable to contributions by or cost to his employer for group term life insurance, accident and health plans and pensions or profit-sharing plans on his behalf, or attributable to amounts received by an employee under such accident and health plans, or attributable to any agreement with his employer for a salary adjustment in return for a deferred compensation arrangement between the employer and the employee, shall be the same as, and not in excess of, the amount properly includable in the gross income of the employee pursuant to the provisions of the Internal Revenue Code of the United States."

Honorable Maurice Schechter

It should be noted that this office has previously held in three former opinions that a school board has the discretionary authority to pay the premiums on liability insurance, life insurance, and health and accident insurance to its employees as part of their compensation (Opinion No. 93, Cason, 9-9-69; Opinion No. 452, Branom, 10-23-69; Opinion No. 500, Vanlandingham, 11-18-69, copies enclosed). More specifically, in Opinion No. 93 in construing the applicable statutes dealing with the employment of teachers, it was held that the terms "wages," "salary," and "compensation" were synonymous. Therefore, it is our view that consistent with Opinion No. 93 and subsection 1 of Section 169.010, supra, and subsection 3 of Section 169.030, supra, a board of education, having decided to purchase liability insurance, health and accident insurance, or life insurance for teachers as part of their compensation, must consider the amount of the premiums as part of the teachers' total compensation; and thus a deduction for payment of contribution to the Public School Retirement System must be made. In this connection, Senate Bill No. 270 refers to the amount to be included in gross income for purposes of income tax and makes no reference to Chapter 169 or any other statute. We are not persuaded that Senate Bill No. 270 has any effect on the determination that the purchase of insurance by a school board as part of a teacher's compensation must be considered as part of the teacher's total compensation; and a deduction for payment of contributions to the Public School Retirement System is required under Chapter 169, even though the premiums may be non-taxable for income tax purposes. In this regard, there is authority for the proposition that repeals by implication are not favored and in order for a later statute to operate as a repeal by implication of an earlier one, there must be such manifest and total repugnance that the two cannot stand, but where two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the earlier one by implication. State v. Ludwig, 322 S.W.2d 841 (Mo. banc 1959). It is, therefore, our opinion that a board of education purchasing insurance as part of a teacher's compensation must consider the amount of the premiums as part of the teacher's total compensation; and a deduction for payment of contributions to the Public School Retirement System of Missouri must continue to be made.

In reference to your second question as to whether there is a specific formula in determining the amount of such compensation as generally the rates of insurance vary, based upon the age and sex of the individual, it is our opinion that this is a matter to be

Honorable Maurice Schechter

decided by each board of education and its employees, after consultation with their insurance carrier.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 500
11-18-69, Vanlandingham

Op. No. 452
10-23-69, Branom

Op. No. 93
9-9-69, Cason

ROAD DISTRICTS:
ROADS & BRIDGES:

A road district organized under the provisions of Sections 233.320 to 233.445, RSMo 1969, may issue bonds pursuant to Section 233.345, RSMo 1969, for the purpose of construction of a maintenance building for road machinery and equipment of the district.

OPINION NO. 10

January 19, 1972

Honorable William J. Cason
State Senator, District 31
Room 415, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Cason:

This is in reply to your request for an official opinion of this office concerning the validity of a bond election held pursuant to Section 233.345, RSMo, by the Mt. Pleasant Township Special Road District of Cass County, Missouri, when the proceeds of such a bond issue are to be expended for the construction of a maintenance building for such road district.

Special road districts may, of course, issue bonds pursuant to the provisions of Section 233.345, RSMo. Subsection 4 of Section 233.345 provides the purposes for which the proceeds of the bonds may be used, reading in part as follows:

" . . . The proceeds of the sale of such bonds shall be used for the purpose only of paying the cost of holding such election, and constructing, repairing and maintaining bridges and culverts within the district, and working, repairing, maintaining and dragging public roads within the district."

Since this language does not specifically provide for the construction of a maintenance building, the question is whether such is implied or incidental to constructing or improving roads, bridges and culverts in the district or township.

We assume, in answering this question, that the purpose of the maintenance building will be for the storage and maintenance of machinery and equipment necessary for the construction or improvement of roads, bridges and culverts.

The rule in interpreting statutes such as Section 233.345 is that a power given carries with it, incidental or by implication, power not expressed, but necessary to render effective the one

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that is expressed. State ex rel. Wahl v. Speer, 284 Mo. 45, 223 S.W. 655, 660 (banc 1920) cited in Sherman Township, Cass County v. L. J. Farr, 406 S.W.2d 630, 632 (Mo. 1966).

The court in Sherman Township, Cass County, supra, stated such rule in holding that a bond issue held pursuant to Sections 233.450 through 233.470 was valid when a portion of the proceeds were to be used for the purchase of necessary road equipment in order to accomplish road improvements. The court stated, l.c. S.W.2d 633:

" . . . However, since we have held that the township has the discretionary authority to do the work without letting a contract, and since there is no statutory provision prohibiting the use of bond funds for the purchase of the necessary equipment, we think that under the facts and circumstances here presented the authority to so purchase said equipment must be reasonably implied."

We also refer you to Attorney General's Opinion No. 141, August 11, 1969, Reid, citing the same rule from State ex rel. Wahl v. Speer, supra, to hold that a county court may use the road and bridge fund to purchase real estate in the county for the purpose of storing machinery used to keep up and build county roads and bridges.

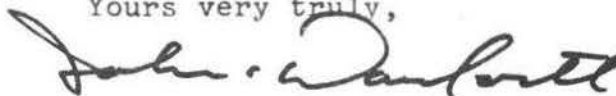
Since there is implied authority to purchase necessary equipment from bond proceeds for road construction and improvement, it follows that there is also the implied authority to construct a maintenance building to store and maintain such equipment.

CONCLUSION

Therefore, it is the opinion of this office that a road district organized under the provisions of Sections 233.320 to 233.445, RSMo 1969, may issue bonds pursuant to Section 233.345, RSMo 1969, for the purpose of construction of a maintenance building for road machinery and equipment of the district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 141
8-11-69, Reid

SCHOOLS:
TAXATION (SCHOOLS):
EXCEPTIONAL CHILDREN:

Under subsection 3 of Section
167.151, RSMo 1969 (providing
that a nonresident taxpayer must
receive credit on tuition charged

his child in an amount equal to the tax paid to the school district), school taxes paid in prior years or delinquent taxes paid in the current year may not be used as a credit against tuition charges for the current year. Furthermore, exceptional children, as defined by Section 178.260, RSMo 1969, whose parents are nonresident taxpayers of a district, are entitled to "appropriate instruction" in accordance with subsection 2 of Section 178.260, RSMo 1969.

OPINION NO. 12

March 20, 1972

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This official opinion is issued in response to your request for a ruling on whether, under Section 167.151.3, RSMo 1969, a person who pays a school tax in a district other than the one in which he resides may send his children to a public school in the district in which the tax is paid and have credited against the tuition charged for the current year (1) school taxes paid in prior years or (2) delinquent taxes paid in the current year. Also, you inquire whether exceptional children, as defined by Section 178.260.1, RSMo 1969, whose parents are nonresident taxpayers of a school district, are entitled to be enrolled in special classes for such children.

In Missouri, a student may attend the public schools of the district in which he lives without the payment of any tuition fee. A school board may charge a tuition fee to pupils who are not residents of the district and, therefore, not entitled to free instruction. See Section 167.151.1, RSMo 1969, which reads as follows:

"Admission of nonresident and other tuition pupils -- orphans exempt from tuition -- school tax credited against tuition. --
1. The school board of any district, in its discretion, may admit to the school pupils not entitled to free instruction and prescribe the tuition fee to be paid by them, except as provided in sections 167.121 and 167.131."

Under certain circumstances, a person may send his children to school in a district other than the district in which he

Dr. Arthur L. Mallory

resides and receive credit on the tuition equal to the amount of school tax paid to the receiving district. Section 167.151.3 provides as follows:

"3. Any person who pays a school tax in any other district than that in which he resides may send his children to any public school in the district in which the tax is paid and receive as a credit on the amount charged for tuition the amount of the school tax paid to the district."

In Opinion No. 235, dated December 12, 1967, to the Honorable Melvin D. Benitz, this office concluded that a parent, under subsection 3, may send his children to any public school in the district in which property tax is paid and the school board of that district does not have the discretion to refuse admittance to those children. In reaching this conclusion, we noted that the most likely purpose underlying this legislation was to permit a person paying school taxes to directly benefit from his tax money. We find no intent expressed or implied in subsection 3 or in any other Missouri statute which would permit a taxpayer to receive credit on the current year's tuition for taxes paid in previous years or for delinquent taxes paid in the current year but attributable to previous years. Certainly, a resident taxpayer receives no direct benefit from school taxes paid in years in which that taxpayer had no children attending the public schools of his district. We find no language in subsection 3 which would lead us to believe that the legislature intended a nonresident taxpayer to have greater rights in this regard.

Therefore, we conclude that under subsection 3 of Section 167.151, RSMo 1969, a nonresident taxpayer may receive credit on the current year's tuition in an amount equal to current school taxes. For example, a nonresident taxpayer who pays real estate taxes in calendar year 1972, should be allowed a credit against any tuition charged him for the school year 1972-1973, in the amount of current school taxes paid.

With reference to your question concerning exceptional children, we understand that the question is whether parents who are nonresident taxpayers of a school district are entitled to have their exceptional child enrolled in special classes.

The term "exceptional child," as used in the statute, "includes children who deviate from the average in physical, mental, emotional or social developmental characteristics to such an extent that they require special educational services in order

Dr. Arthur L. Mallory

to develop to their maximum capacity." Section 178.260.1, RSMo 1969. (The definition does not include "gifted" children. Section 178.270.5, RSMo 1969.) The State Board of Education establishes "standards and regulations for determining those children who are eligible for special education under the provisions of Section 178.260. . . ." Section 178.270.3, RSMo 1969.

Every school district in the State is required to provide appropriate instruction for exceptional children.

"2. The board of education of each school district, except school districts in any county of the first class in which a special school district has been organized under sections 178.640 to 178.760, shall provide appropriate instruction for exceptional children between the ages of six and twenty years residing in the district who are educable and capable of benefiting by special education. Each six-director, urban and metropolitan school district in any county of the first class in which such special school district has been organized shall provide all appropriate instruction in remedial reading for its enrolled children, if such instruction is approved by the state board of education. The special school district in such county shall provide all appropriate instruction approved by the state board of education for all other categories of exceptional children hereunder." Section 178.260.2, RSMo 1969.

Therefore, it is the duty of the school district in which the exceptional child resides to provide appropriate instruction. If the school district in which the child resides does not have its own program for exceptional children, the Missouri Legislature has authorized it to contract with another school district for such instruction.

"Exceptional child defined -- board to provide instructions, exceptions -- transportation to be provided. -- 1. The term 'exceptional child' as used herein includes children who deviate from the average in physical, mental, emotional or social developmental characteristics to such an extent that they require special educational services in order to develop to their maximum capacity. Local districts may establish

Dr. Arthur L. Mallory

special programs by contracting with nearby districts for the education of one or more such children; or when any child cannot attend classes economically, safely or conveniently by providing adequate home instruction. Regulations for home instruction shall be established by the state board of education." Section 178.260.1, RSMo 1969.

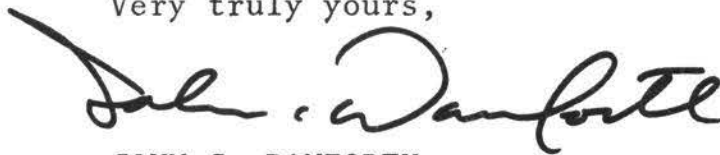
We have previously determined that under Section 167.151.3, a school district must provide education for the child of a nonresident taxpayer. Where the nonresident taxpayer has an exceptional child, we believe that the school district which receives the school taxes must provide "appropriate instruction" for the exceptional child. We discern no legislative intent to prevent a nonresident taxpayer who has an exceptional child from benefiting from his school taxes. Any interpretation of Sections 167.151.3 and 178.260, which would treat exceptional children differently from nonexceptional children, could lead to serious constitutional problems.

CONCLUSION

Therefore, it is the conclusion of this office that under subsection 3 of Section 167.151, RSMo 1969 (providing that a nonresident taxpayer must receive credit on tuition charged his child in an amount equal to the tax paid to the school district), school taxes paid in prior years or delinquent taxes paid in the current year may not be used as a credit against tuition charges for the current year. Furthermore, exceptional children, as defined by Section 178.260, RSMo 1969, whose parents are nonresident taxpayers of a district, are entitled to "appropriate instruction" in accordance with subsection 2 of Section 178.260, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant D. Brook Bartlett.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure:

Opinion No. 235, Benitz, 12-12-67

January 10, 1972

OPINION LETTER NO. 15
Answer by letter-Wood



Honorable J. Anthony Dill
Representative, District 44
8011 Grandvista Avenue
St. Louis, Missouri 63123

Dear Representative Dill:

You have asked for my legal opinion on the following questions:

- "1. Is an act of the legislature required to dissolve 'the Druids' Hall Association', a corporation created by a special act of the legislature and approved February 16, 1857, laws of 1857, page 639.
- "2. If an act of the legislature is required to dissolve this corporation created by special act of the legislature, should the dissolving act provide for the manner of distribution of remaining assets of such corporation or does the general law, such as the law of escheats, direct the manner of distribution of remaining assets?"

The Act of 1857 referred to is herein set out:

"Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1.--That Turner Maddox, John W. Colvin, Henry Bischoff, Frederick Spies, John F. Tuckman, John Ulbricht, George Hasfurther, Michael Ostertag, Henry Teustel, George Schoenhals,

Honorable J. Anthony Dill

Charles F. Cady, Conrad Philips, John A. Kaltwasser, George P. Daub, John L. Link, Philip Stremmel, Charles P. Meissner, Oswald Benken-dorf, Lewis Miller, John Keil, Nicholas Berg, Julius Hennig, Casper Gellenbeck, George Moeler, Edward E. Allen, Henry Spukler, George H. Senden and Henry Kling, and their associates and suc-cessors in office, shall be and they are hereby created a body politic and corporate, by the name and the style of 'The Druids' Hall Associa-tion,' with a capital stock of fifty thousand dollars, which may be increased at the will of the stockholders, to any amount not exceeding two hundred thousand dollars, in shares of twenty dollars each; by which name they and their successors shall have perpetual succes-sion, and are made capable in law and equity of acquiring and holding any and every kind of property whatever, for the purpose of build-ing a Druids' Hall in the city of St. Louis, and the same to sell or otherwise dispose of; of contracting and being contracted with, of suing and being sued, of defending and being defended against in all courts and places whatever, in all manner of actions, and may have a common seal, and the same to alter or change at pleasure.

§ 2.--The above named persons, or any three of them, shall have power to open books for subscription of the said stock, in such manner and at such time and places as they may appoint, and to close the same; and the sub-scribers shall meet at such time and place as the above named persons, or any three of them, shall appoint, by first giving notice of such meeting in one or more newspapers in the city of St. Louis, and choose sixteen directors, one of whom shall be chosen President; and said directors shall hold their offices until their successors are elected and qualified ac-cording to the by-laws of said association.

§ 3.--The affairs of said association shall be managed by said directors, who shall be chosen by the stockholders annually, in such manner and at such times as the by-laws may provide.

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§ 4.--Any grove, degree grove, chapter, grand grove, or other organization of regular Druids, shall have power to subscribe and hold stock in said association, which stock shall be represented by the chief officer of said grove, degree grove, chapter, grand grove, or other organization of regular Druids for the time being.

§ 5.--The stock of said association shall be considered personal property, and shall be transferable according to such rules and under such restrictions as the Board of Directors may by the by-laws direct; who may also, by their by-laws, prescribe what number of directors shall form a board competent to transact business of the association, prescribe what number of officers are necessary, their duties titles and salaries, and such other things as they may deem proper, always, however, subject the laws of this State.

§ 6.--The funds of the corporation hereby created are hereby exempted from taxation, and shall be expended in buying an adequate lot or piece of ground, and erecting thereon a building sufficient and commodious for the use of the United Ancient Order of Druids, in the city of St. Louis; which ground and building, while the same or any part thereof shall be occupied and used for the purpose herein mentioned, shall not be subject to taxation.

"This act shall take effect and be in force from and after its passage.

"Approved February 16, 1857."

The general law on dissolving corporations has been thus stated:

"A corporation may be wound up and dissolved either voluntarily or involuntarily. It is said by Blackstone (1 Bl Com 485) that 'a corporation may be dissolved: (1) By act of Parliament, which is boundless in its operations; (2) by the natural death of all its members, in case of an aggregate corporation; (3) by surrender of its franchises into the hands of the King, which is a kind of suicide; (4) by

Honorable J. Anthony Dill

forfeiture of its charter, through negligence or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void.' . . ." (19 Am.Jur.2d, Corporations, Section 1588, p. 954)

Your questions relate to the first situation described by Blackstone and it is to that which we will give primary consideration herein.

Blackstone's first situation does not completely obtain in this country, at least since the decision in The Trustees of Dartmouth College v. Woodward, 4 Wheat 518, 4 L.Ed. 629 (1819) giving to corporate charters the status of contracts, the obligations of which cannot be later impaired by the state (Article I, Section 10, Constitution of the United States). Therefore, unless the right of the state to dissolve a corporate charter is reserved, it cannot be subsequently dissolved through repeal of the charter. Graham v. Folsom, 200 U.S. 248, 50 L.Ed. 464, 469 (1906); Louisville Gas Co. v. Citizens Gas Light Co., 115 U.S. 683, 29 L.Ed. 510, 515 (1885); New Jersey v. Yard, 95 U.S. 104, 24 L.Ed. 352, 354 (1877). The charter granted to the Druids' Hall Association contains no reservation of the power of the state to later alter, amend, or repeal it. A general law in effect at the time this special charter was granted provided:

"Sec. 7 The charter of every corporation that shall hereafter be granted by the legislature, shall be subject to alteration, suspension, and repeal, in the discretion of the legislature." (RSMo 1845, p. 230, 232; 1855, p. 369, 371) (See State on inf. Dalton v. Holekamp Lumber Co., 331 S.W.2d 171, 177 (St.L.Ct.App. 1960) for an exposition of the subsequent history of this statute which today appears as Section 351.700, RSMo 1969)

The United States Supreme Court has recognized that a state may reserve through general law the power to amend, alter, or repeal special charters. City of Covington v. Commonwealth of Kentucky, 173 U.S. 231, 43 L.Ed. 679, 682 (1899). Our Supreme Court, on a number of occasions, has refused to read provisions of the general corporation law into special charters for charitable or educational purposes granted by the legislature prior to the adoption of the Constitution of 1865 (when the state's power to alter, amend, or repeal all corporate charters was reserved in the Constitution; Article VIII, Section 4, Constitution of Missouri, 1865).

Honorable J. Anthony Dill

State ex rel. Banister v. Trustees of William Jewell College, 260 S.W.2d 479, 481-482 (Mo. banc 1953)

Trustees of William Jewell College v. Beavers, 171 S.W.2d 604, 608 (Mo. banc 1943)

State ex rel. Morris v. Board of Trustees of Westminster College, 74 S.W. 990, 991 (Mo. 1903)

State ex rel. Clover v. Ladies of the Sacred Heart, 12 S.W. 293 (Mo. 1889)

The rule has been otherwise as to special charters issued to business or public corporations during this period, whose charters have been held to include all provisions of general law existing at the time of the grant, including the reserved right of alteration, amendment, or repeal contained in the general corporation law (RSMo 1845, p. 230, Sec. 7).

State ex rel. Hines v. Cape Girardeau & Jackson Gravel Road Co., 105 S.W. 761 (Mo. Banc 1907)

Gregg v. Granby Mining & Smelting Co., 65 S.W. 312 (Mo. 1901)

Watson Seminary v. Pike County Court, 50 S.W. 880, 883 (Mo. 1899) (Public corporation)

We cannot determine from its charter alone the exact nature and character of the Druids' Hall Association, and particularly whether it was a charitable or educational organization, or a business corporation to be operated for the profit of its members. We do note a general law in effect at that time providing for the incorporation of benevolent associations, which associations were to be ". . . governed by the provisions of the act concerning corporations, except as herein otherwise limited." (RSMo 1855, Vol. 1, p. 379, 381). Evidently, the incorporators of the Druids' Hall Association did not desire a charter under either the general corporation law or the benevolent association law and chose instead the special charter granted to them by the legislature in 1857. Accordingly, we have some question as to whether the provisions of the general corporation law in effect when the special charter was granted to the Druids' Hall Association did apply to and become a part of such charter, so as to effect the necessary reservation by the state of the power to alter, amend, or repeal the association's charter. We are therefore hesitant to advise you that involuntary

Honorable J. Anthony Dill

dissolution of the Druids' Hall Association through an act repealing its charter is an appropriate means of dissolution.

However, as already indicated, there are other methods of accomplishing dissolution:

" . . . The duration of a corporation, though unlimited by its charter, and though it is given the capacity to have perpetual succession cannot be regarded as 'everlasting,' within the general and common meaning of that word. It may be dissolved and cease to exist for want of members, by voluntary surrender of franchises, forfeiture by misusers, etc. . . ." (State ex rel. Walker v. Payne, 31 S.W. 797, 798 (Mo. banc 1895))

The above, of course, restates the last three methods described by Blackstone for dissolving a corporation. Since you state that some of the members of the corporation are still alive, and since you do not indicate that there exists any violation of the corporate franchise which might justify an action in quo warranto, it would appear that voluntary surrender of the corporate charter by all living members is the best means of now dissolving the corporation.

As stated, we cannot determine from its charter alone if the Druids' Hall Association is a business corporation for profit, a religious or charitable association, or a corporation not for profit. This determination would necessarily have to be made on the basis of the corporation's actual activities and manner of operation. If, in fact, the corporation is a business corporation for profit, we believe it may accept the provisions of the General and Business Corporations Law in the manner set out in Section 351.025, RSMo. Dissolution of the corporation could be thereafter effected in the manner prescribed by this law (Sections 351.460, et seq., RSMo). If, in fact, the corporation is a corporation not for profit engaged in any of the purposes specified in Section 355.025, RSMo, we believe it may accept the provisions of the General Not For Profit Corporation Law in the manner set forth in Section 355.020, RSMo, and thereafter dissolve following the procedures directed by that law (Section 355.255, RSMo).

Yours very truly,

JOHN C. DANFORTH
Attorney General

CONSTITUTIONAL LAW:
PENSION FUNDS;
INVESTMENTS:

Trustees of pension fund may make investments authorized by statutes without being restricted by constitutional limitations on investments by political corporations or subdivisions of the state.

Compare: 529 SW 2 388

OPINION NO. 16

March 6, 1972

Honorable Charles S. Broomfield
State Representative, District 87
Room 401A Capitol Building
Jefferson City, Missouri 65101



Dear Representative Broomfield:

This official opinion is issued pursuant to your request in which you ask whether the Pension Board of the Firemen and Policemen's Pension Fund of North Kansas City is subject to the restrictions of Section 23, Article VI of the Constitution of Missouri, which reads as follows:

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

In your opinion request you stated that Section 86.590, RSMo 1969 governs investments by police and firemen's pension funds of North Kansas City. Such section adopts the provisions of the statutes governing investments by life and accident insurance companies. These latter provisions need not be set out in full. They are found in Sections 376.300 to 376.310, RSMo 1969. It is sufficient for present purposes to observe that the statutes authorize some investments which would not be permitted by a "county, city or other political corporation or subdivision of the state."

A question very similar to the one you present was decided by the Texas Court of Civil Appeals in the case of Bolen v. Board of Firemen, 308 S.W.2d 904 (1957). That case involved the permissible investments for firemen's pension funds, under constitutional provisions very similar to the provisions of the Missouri Constitution

Honorable Charles S. Broomfield

quoted above. The court concluded that the board which administered the firemen's pension funds was not a political corporation or subdivision, and that the statutes permitting it to invest in common stocks did not violate constitutional provisions forbidding political corporations and subdivisions to subscribe for the stock of private corporations. The opinion states at page 905:

"The Board just simply is not a political corporation nor a political subdivision of the State. It does not have any of the attributes of a political subdivision. A political subdivision contemplates: geographical area and boundaries, public elections, public officials, taxing power and a general public purpose or benefit. The Board has none of these attributes. . . ."

The court cited Wallace v. Childers, 198 Okl. 604, 180 P.2d 1005 (1947), holding that a pension fund was not a city or public fund, but rather was a fund held in a fiduciary capacity for the benefit of the participants. That case also cited Federal Deposit Insurance Corporation v. Casady, 106 F.2d 784 (10th Cir. 1939), which held that a sinking fund for the repayment of bonds was a trust fund for the benefit of the bondholders, and not a fund containing public monies.

The Supreme Court of Oregon in the case of Sprague v. Straub, 451 P.2d 49 (1969), held that a statute authorizing the purchase of corporate stock with money from the Public Employees' Retirement Fund was not contrary to the provisions of a constitutional provision prohibiting the state from subscribing to or being interested in the stock of any company, association or corporation. The court said 1.c. 58:

"We are of the opinion that the people intended the prohibition in Article XI, § 6 to apply only to funds owned by the state and not to funds which the state has expended and for which the state has received a quid pro quo, as it does when it receives coverage for its employees through its contributions as an employer to these funds.

"We do not mean to suggest that Article XI, § 6 can be circumvented simply by the transfer of state moneys to a trustee who is granted the power to invest in corporate stocks. In that case the state would continue to have the beneficial ownership of the fund and would be subject to the constitutional prohibition. But

Honorable Charles S. Broomfield

that is not the situation we have before us. The state's custodianship of these funds is not a device to circumvent the constitution; it is set up to implement a workmen's compensation plan and a retirement plan. Moreover, as we have pointed out, the state has no beneficial ownership of any part of these funds, in this respect having no different standing than other contributing employers.

"There are few cases in other jurisdictions bearing upon the question before us. *Bolen v. Board of Firemen, etc.*, 308 S.W.2d 904 (Tex. Civ.App.1958), although not precisely in point, contains reasoning similar to that which we have employed. In that case a statute authorized a pension board to invest pension funds of firemen and policemen in corporate stocks. The fund was held by the city treasurer and was administered by a board composed of the mayor, two city councilmen, two firemen and two policemen. In holding that the statute authorizing investments in corporate stocks did not violate the Texas Constitution prohibiting the state or any county, city or town from loaning or pledging its credit to any individual or corporation, the court said:

'It is true that the city pays money into this trust fund, but once it is paid into the fund the city loses control over it and it no longer belongs to the city. The law just happens to name the mayor and two councilmen as members of the Board, but it might just as well have named someone else. The fact that the mayor and two councilmen happen to be members of the Board does not make the trust funds property belonging to the city. The City Treasurer just happens to be named as ex officio treasurer of the pension fund, but this fact, again, does not give the city, as such, any control over the funds or make them city property.' 308 S.W.2d at 905.

The same idea is expressed in *Wallace v. Childers*, 198 Okl. 604, 180 P.2d 1005, 1007 (1947).

Honorable Charles S. Broomfield

"These cases express essentially the same point of view as that taken in *Bennett v. State Industrial Accident Commission*, supra, and fortify our conclusion that Article XI, § 6 is not violated by the investment of moneys from the Industrial Accident Fund and the Public Employees' Retirement Fund in corporate stocks.

"Plaintiffs also contend that Section 19 of the Act violates the separation of powers principle pronounced in Article III, § 1 of the Oregon Constitution. Plaintiffs interpret Section 19 to mean that this court is required to pass upon the validity of each investment proposed to be made by the Investment Council out of the Industrial Accident Fund and Public Employees' Retirement Fund which, it is argued, 'would require the Judicial Department to exercise executive functions and to render non-judicial advisory opinions.'"

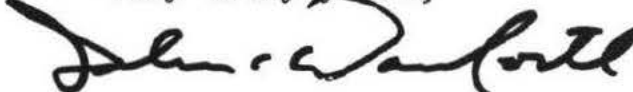
We believe that the Bolen case is well reasoned and that the Missouri courts would follow it. Pensions are a form of additional compensation. A pension fund exists for the sole benefit of the participants, so as to provide them the benefits to which they are entitled when the benefits come due. Its operation is quite comparable to that of an insurance company, which accumulates premiums and pays benefits in accordance with contract obligations.

CONCLUSION

It is the opinion of this office that the provisions of Section 86.590, RSMo 1969, authorizing the investment of firemen and policemen's pension funds in the manner permitted by life and accident insurance companies are valid and do not conflict with the restrictions on investments by cities or other political subdivisions of the state contained in Article VI, Section 23, Missouri Constitution.

The foregoing opinion which I hereby approve was prepared by my special assistant, Charles B. Blackmar.

Very truly yours,



JOHN C. DANFORTH
Attorney General

COUNTIES:
TOWNSHIPS:

Upon a third class county becoming a second class county, pursuant to Chapter 48, RSMo 1969, the alternative form of government, i.e., township organization, if previously adopted, automatically ceases to exist.

OPINION NO. 17

February 15, 1972

Honorable Don F. Whitcraft
Prosecuting Attorney
Cass County
P. O. Box 57
Harrisonville, Missouri 64701



Dear Mr. Whitcraft:

This letter is in response to your request for an opinion on the following submitted question:

"An alternative form of government known as 'township organization' is authorized by Section 65.010 [RSMo 1969] for third and fourth class counties. Does 'township organization' automatically cease to exist when a third class county becomes a second class county?"

In the situation depicted in your opinion request, you mentioned that as of January 1, 1973, Cass County would change from a third to a second class county. It is assumed that such change is in accordance with the applicable provisions of Chapter 48, RSMo 1969. It was also indicated that Cass County, as a third class county, had adopted the alternative form of government, i.e., township organization, as provided by Chapter 65, RSMo 1969.

The Missouri Constitution, 1945, Article VI, Section 8, not only provides for the classification and organization, by general laws, of counties into not more than four classes but also establishes that ". . . all counties within the same class shall possess the same powers . . . be subject to the same restrictions. . . . [and any] law applicable to any county shall apply to all counties in the class to which such county belongs." Section 9 of Article VI provides that "[a]lternative forms of county government for the counties of any particular class and the method of adoption thereof may be provided by law."

The legislature by Section 65.010, RSMo 1969, has provided for an "alternative form of county government" for counties of the third and fourth class, i.e., the township organization form of government.

Honorable Don Whitcraft

However, the legislature has not enacted any provision providing for such form of government for counties of the first and second class. It would be the opinion of this office, therefore, that once a county classification changes from either a third or fourth to a second or first class county, that the alternative form of government provided by Section 65.010, RSMo, if adopted, ceases to exist.

There are further provisions within Chapter 65, RSMo, specifically Sections 65.020 and 65.610, which provide for the abolishment of the township form of county government by a majority vote of the inhabitants voting thereon. These sections, however, are not applicable and do not require an affirmative vote of abolishment when the situation exists as outlined in your opinion request.

CONCLUSION

It is the opinion of this office that upon a third class county becoming a second class county, pursuant to Chapter 48, RSMo 1969, the alternative form of government, i.e., township organization, if previously adopted, automatically ceases to exist.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Kermit W. Almstedt.

Yours very truly,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

SCHOOLS:
TEACHERS:

1. Under Section 168.126, RSMo 1969, a board of education need not give a probationary teacher ninety days notice prior to

April 15 of its intention not to rehire the teacher because of incompetency in order to lawfully refuse to renew that probationary teacher's contract for the next school year; 2. The time periods in Sections 168.116 and 168.126, RSMo 1969, should be computed on the basis of calendar days excluding the first day and including the last in accordance with Section 1.040, RSMo 1969.

OPINION NO. 18

March 28, 1972

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This official opinion is issued in response to your request for a ruling on the following questions:

"1. Are school boards, except those of metropolitan districts, required to issue contracts for the ensuing year to probationary teachers employed by these boards if written statements setting forth alleged incompetencies are not furnished teachers ninety days prior to April fifteenth?

"2. If a school board is required to issue a contract for the ensuing year because a written notice setting forth the alleged incompetency is given the teacher less than ninety days prior to April fifteenth, may the Board of Education terminate such a contract if improvement satisfactory to the Board of Education has not been made within the ninety day period?

"3. Sections 168.116 and 168.126, RSMo, refer to the number of days' notice must be given teachers before certain actions can be taken by local school boards. How is this time to be computed? In calendar days or in school days? If school days, how should school holidays and days when school is dismissed for teachers meetings be handled?"

Dr. Arthur L. Mallory

Your first two questions require, initially, an interpretation of Section 168.126, RSMo 1969, of the Missouri Teacher Tenure Act.

"Probationary teachers, how terminated -- reemployed, how. -- 1. A board of education at a regular or special meeting may contract with and employ by a majority vote legally qualified probationary teacher for the school district. The contract shall be made by order of the board; shall specify the number of months school is to be taught and the wages per month to be paid; shall be signed by the probationary teacher and the president of the board and attested by the secretary of the board. The board shall not employ one of its members as a teacher; nor shall any person be employed as a teacher who is related within the fourth degree to any board member, either by consanguinity or affinity, where the vote of the board member is necessary to the selection of the person.

"2. If in the opinion of the board of education any probationary teacher has been doing unsatisfactory work, the board of education through its authorized administrative representative, shall provide the teacher with a written statement definitely setting forth his alleged incompetency and specifying the nature thereof, in order to furnish the teacher an opportunity to correct his fault and overcome his incompetency. If improvement satisfactory to the board of education has not been made within ninety days of the receipt of the notification, the board of education may terminate the employment of the probationary teacher immediately or at the end of the school year. Any motion to terminate the employment of a probationary teacher shall include only one person and must be approved by a majority of the members of the board of education. A tie vote thereon constitutes termination. On or before the fifteenth day of April but not before April first in each school year, the board of education shall notify a proba-

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tionary teacher who will not be retained by the school district of the termination of his employment.

"3. Any probationary teacher who is not notified of the termination of his employment shall be deemed to have been appointed for the next school year, under the terms of the contract for the preceeding year. A probationary teacher who is informed of reelection by written notice of tender of contract on or before the fifteenth day of April but not before April first shall within fifteen days thereafter present to the employing board of education a written acceptance or rejection of the employment tendered, and failure of such teachers to present the acceptance within such time constitutes a rejection of the board's offer. A contract between a probationary teacher and a board of education may be terminated or modified at any time by the mutual consent of the parties thereto."

We understand your first question to be whether the board of education of a school district other than a metropolitan district must advise a probationary teacher at least ninety days prior to April 15 of its intention not to offer the probationary teacher a contract for the ensuing school year. We understand and will assume, for the purposes of writing this opinion, that your request has nothing to do with the probationary teacher's contract for the current year, but that it relates only to whether that teacher will receive a contract for the next school year.

Under the Missouri Teacher Tenure Act there are two classifications of teachers -- permanent teachers and probationary teachers. See Section 168.104(4) (5). As the name would indicate, the Teacher Tenure Act grants to permanent teachers significant rights not granted to probationary teachers. The contractual arrangement between a permanent teacher and the employing school district is described as an indefinite contract. Section 168.104 (3) and Section 168.106. This contract continues in effect for an indefinite period subject only to those terminating events set forth in Section 168.106. The board of education of a school district can terminate the contract for cause only after a notice and hearing as provided in Section 168.114, Section 168.116 and Section 168.120. Unless one of the events described in Section 168.106 occurs, every permanent teacher has a contract which continues in effect from year to year without the necessity of specific action on the part of the board of education or on the part of the teacher. This protection afforded a permanent teacher is

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referred to as tenure and is obtained only after a teacher has been employed in the same school district for six successive years. See Section 168.104(4); Opinion No. 269 to Honorable Eric F. Fink, dated May 13, 1971, and Opinion No. 371 to Honorable James P. Mulvaney, dated October 2, 1970, copies of which are enclosed.

On the other hand, as the name would denote, probationary teachers do not have indefinite contracts and, under the Missouri Teacher Tenure Act, are subject to less contractual protection than is a permanent teacher. The probationary period gives the administration of the school district an opportunity to determine whether a teacher is qualified for permanent status in that district. In Orr v. Trinter, 444 F.2d 128 (6th Cir., 1971), the Court stated that, "the very reason for the probationary period is to give the board a chance to evaluate the teacher without making a commitment to rehire him." Although this decision was based on the Ohio Teacher Tenure Act, we believe that a complete reading of the Missouri Teacher Tenure Act indicates that the Missouri Legislature also intended that a probationary teacher be, as the name would denote, on probation for five successive years of teaching in a school district.

Turning, now, to Section 168.126, subsection 2 of this section pertains to two distinct situations: (a) termination of a probationary teacher's current contract because of unsatisfactory work and (b) renewal of a probationary teacher's contract for the next school year. As this office has previously pointed out in Opinion No. 178, dated July 19, 1971 (a copy of which is enclosed herewith), a probationary teacher's current contract may be terminated for unsatisfactory work only after a written statement is delivered to the teacher setting forth each and every area of incompetency in which the board desires improvement in sufficient detail to permit the teacher an opportunity to correct the alleged faults within ninety days. This notice requirement gives the teacher who is under contract, yet on probation, the opportunity to avoid being peremptorily dismissed for incompetency. Peremptory termination for incompetency during the contract period could have serious repercussions on a teacher's future career. Also, finding a new job during a school year could be most difficult.

When the question is not termination of a current contract, but whether a teacher will receive a contract for the next school year, the legislature provided probationary teachers with a different kind of protection. Notice must be given prior to April 15 of the board's intention not to rehire or else the teacher is automatically rehired. We find no language in subsection 2 of Section 168.126 tying the last sentence in with the first two sentences of that subsection. We believe the first two sentences clearly relate to termination of a current contract during or at the end of a school year. For instance, the third sentence states:

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" . . . If improvement satisfactory to the board of education has not been made within ninety days of the receipt of the notification, the board of education may terminate the employment of the probationary teacher immediately or at the end of the school year. . . ."

No reasonable interpretation of this sentence makes it applicable to whether a teacher will be rehired for the next school year. The only argument which can be made that the ninety day notice provision applies to contract renewal as well as termination during the term of the contract is that the last sentence of subsection 2, pertaining to rehiring, is included in the same subsection dealing with termination during the term of the contract. We agree that the cause of clarity would have been greatly served by placing the last sentence of subsection 2 in subsection 3 of this section. However, the complete absence of any reference to rehiring in the first sentences of subsection 2 pertaining to the ninety day notice convinces us that the legislature did not intend to restrict the board of education in its hiring plans for the next year by requiring that ninety days notice be given prior to April 15 if a teacher is not going to be rehired due to incompetency.¹

Any other interpretation of the ninety day notice provision would raise practical problems. Assuming arguendo that the ninety day notice provision applied to rehiring as well as termination, suppose the probationary teacher's incompetency first exhibited itself in late February. If the ninety day notice were given immediately, it would be less than ninety days until April 15. The board would have to offer the teacher a contract for the next year even though he was under a ninety day notice. Suppose, further, the teacher failed to correct the fault and was terminated the end of May. This situation would then exist -- probationary teacher's current contract terminated but by operation

Footnote

1. It should be noted that the ninety day notice provision applies only to termination due to incompetency. Therefore, even if the ninety day provision did apply to rehiring, it would apply only to probationary teachers not rehired due to incompetency. However, no statute requires a school board to give a teacher an explanation of why he is not being rehired. If the ninety day notice provision were applicable to rehiring, a teacher who was not rehired and did not receive a ninety day notice might contend that incompetency was the real reason. In this way, the ninety day notice provision could lead to an increase in teacher-board strife and litigation.

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of law the teacher would have a contract for the next school year. We do not believe the legislature intended for such an absurd result to be a possibility.

That fewer safeguards are provided probationary teachers when the question is whether they will be rehired, than are provided when the question is termination of current contract rights represents a reasonable legislative policy. Certainly, the decision by a school board not to rehire a teacher casts less grave or no reflection on a teacher than the decision to terminate a contract during its term. A provision giving a probationary teacher less rights when the question is whether the teacher will be rehired than when the question is whether the current contract will be terminated, is found in teacher tenure acts in other states. See Lunderville v. Emery Unified School District, 68 Cal.Rptr. 768 (1968 Ct.Apps.).

Therefore, we conclude that under Section 168.126, the board of education of a Missouri school district (other than a metropolitan school district) need not give a probationary teacher ninety days notice of its intention not to rehire due to incompetency but must, in accordance with subsection 2 of Section 168.126, advise the probationary teacher between April 1 and April 15 of its intention not to rehire. If the probationary teacher is not so notified, he shall be deemed to have been appointed for the next school year under the terms of the contract for the preceding year. See subsection 3 of Section 168.126.

Even though we have concluded that the Missouri Legislature does not require that notice be given prior to a decision not to renew a probationary teacher's contract because of incompetency, consideration should be given to whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that a probationary teacher receive notice and an opportunity to be heard before a school board decides not to renew the teacher's contract for the next year. Under certain circumstances, courts in other jurisdictions have held that a probationary teacher must receive a notice stating why his contract is not being renewed and an opportunity to appear before the board before his contract can lawfully not be renewed. See, for instance, Shirck v. Thomas, 447 F.2d 1025 (7th Cir., 1971).

However, the Eighth Circuit Court of Appeals has taken a different position. In Freeman v. Gould Special School District of Lincoln County, Arkansas, 405 F.2d 1153 (8th Cir., 1969), six teachers sought to have the Court compel the defendant school district to renew their annual teaching contracts. In May, 1967, plaintiffs received notice that their contracts would not be renewed for the next year. The notification was in accordance with an Arkansas statute which provided for automatic renewal of teacher's contracts unless notice to the contrary was given within a prescribed time.

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Plaintiffs argued that the Due Process Clause was violated unless the board could show good cause for not renewing their contracts. The Court rejected this substantive due process argument as follows:

"Almost all of the cases cited in support of plaintiffs' position are concerned with either racial discrimination or an invasion of a constitutionally protected right or privilege by way of a statute or regulation. We agree that the teachers are protected under the Equal Protection Clause from discrimination on account of race or religion or in their assertion of constitutionally protected rights, but no case cited by plaintiffs has gone so far as to say that all actions of any governmental board or agency in employment cases must accord the individual due process under the Fourteenth Amendment so as to provide tenure and a right to retain the position, except for cause. And 'for cause' presupposes a right to hearing, notice, and appeal. Many government employees are under civil service and some under tenure. Absent these security provisions a public employee has no right to continued public employment, except insofar as he may not be dismissed or failed to be rehired for impermissible constitutional reasons, such as race, religion, or the assertion of rights guaranteed by law or the Constitution." Id. at 1159. (Emphasis supplied.)

* * *

". . . On the basis of this holding, plaintiffs then project that the Board must accord due process, both substantive and procedural, in all of its operative procedures. If this were so, we would have little need of tenure or merit laws as there could only be, as argued by the plaintiffs, a discharge for cause, with the school board carrying the burden of showing that the discharge was for a permissible reason. We do not believe this to be the law, as there are many public employees who are separated from their employment by a purely arbitrary decision, upon a change of administration or even a change of factual control where the appoint-

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ments are not protected by civil service or some type of tenure, statutory or contractual." Id. at 1160.

Plaintiffs in the Freeman case, although granted a hearing by the board, argued that they had been denied procedural due process because they were not permitted an opportunity to cross-examine their primary accuser. The Court rejected this argument, also:

"When a particular statutory procedure is set up for the dismissal of a teacher it must be followed, but absent statutory procedures the Board may adopt its own method. . . ." Id. at 1160.

* * *

". . . Absent statutory or contractual requirements, persons discharged for inefficiency, incompetency, or insubordination have no constitutional right to a hearing with rights of cross-examination and confrontation of witnesses." Id. at 1161.

For further authority that a school board in Missouri, even when terminating a teacher's current contract, is not required to provide any of the safeguards of procedural due process except those provided in the applicable statutes, see Brooks v. School District of the City of Moberly, 267 F.2d 733 (8th Cir., 1959); Wilson v. Pleasant Hill School District, No. 18501-4 (Western District of Missouri, March 1, 1971), and Judge Wangelin's Order of November 30, 1971, in Beauregard v. Board of Education of the Hazelwood School District, No. 71 C 337(4) (Eastern District of Missouri). Based on the foregoing decisions, we believe that the interpretation of federal law governing Missouri, at this time, is in accord with the decision of the Sixth Circuit Court of Appeals in Orr v. Trinter, 444 F.2d 128 (6th Cir., 1971).² Plaintiff, a

Footnote

2. Several cases are currently pending before the United States Supreme Court which raise issues pertaining to the rights of probationary teachers. See Perry v. Sindermann, No. 70-36; State College Board of Regents v. Roth, No. 71-162, argued on January 18, 1972; and Thomas v. Shirck, No. 71-819. Should The Supreme Court adopt a rule contrary to the position of the Eighth Circuit Court of Appeals, the conclusion of this opinion would undoubtedly need to be altered.

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probationary teacher without tenure, had received notice that his contract would not be renewed for the next year. Plaintiff argued that the failure to give reasons for non-renewal of his contract and a hearing at which he could challenge the reasons violated his rights under the Due Process Clause. The Court rejected this argument stating as follows:

"First, the Fourteenth Amendment only protects against the State depriving one of life, liberty, or property without due process of law. 'It has been held repeatedly and consistently that Government employ is not "property." * * * We are unable to perceive how it could be held to be "liberty." Certainly it is not "life."' Bailey v. Richardson, 182 F.2d 46 (D.C.Cir.), aff'd by an equally divided Court, 341 U.S. 918, 71 S.Ct. 669, 95 L.Ed. 1352.

"Second, in the unique situation of a probationary school teacher, the failure to give reasons for the refusal to rehire is not arbitrary and capricious action on the part of the Board since the very reason for the probationary period is to give the Board a chance to evaluate the teacher without making a commitment to rehire him. A non-tenured teacher's interest in knowing the reasons for the non-renewal of his contract and in confronting the Board on those reasons is not sufficient to outweigh the interest of the Board in free and independent action with respect to the employment of probationary teachers. The Board is not a legal tribunal. It is an employer, and when it decides to hire or not to hire a particular teacher, it is acting 'as proprietor, to manage the internal operation' of the public schools. Cafeteria and Restaurant Workers, Local No. 473 v. McElroy, supra, 367 U.S. at 896, 81 S.Ct. at 1749. . . ."

* * *

"On the other hand, if the reason, either as stated by the Board or as suspected by the teacher, for the refusal to rehire the teacher is constitutionally impermissible the teacher can state a claim for which relief can be granted under 42 U.S.C. Sec-

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tion 1983. We cannot agree that the refusal to rehire plaintiff without giving reasons is itself a violation of either substantive or procedural due process. We hold that the failure to give a reason for the refusal to rehire, or to grant a hearing in connection therewith, standing alone, is not constitutionally impermissible conduct on the part of the Board of Education."

* * *

"In conclusion we emphasize that an essential feature of State teacher tenure laws is to require a teacher to serve a probationary period before attaining the rights of tenure. State statutes prescribe the rights of tenured teachers to written charges, public hearings and judicial review. The determination as to whether the quality of services of a particular teacher entitles him to continued employment beyond the probationary period, thereby qualifying him for tenure status, or whether his contract of employment should not be renewed prior to attainment of tenure status, is the prerogative of the employer, the Board of Education. In the present case Orr seeks to persuade this court to render a decision which would confer certain tenure privileges upon non-tenured teachers -- in effect to amend the Ohio statute by judicial decree. This we decline to do." Id. at 134-135. (Emphasis supplied.)

In view of our conclusion with regard to your first question, that it is not necessary to give notice to a probationary teacher prior to the notice of refusal to renew the teacher's contract for the next school year, it is not necessary to answer your second question.

Your third question inquires about whether the time periods set forth in Sections 168.116 and 168.126 are to be computed on the basis of calendar days or school days.

We find no provision in the Missouri Teacher Tenure Act setting forth the method by which the time shall be measured. Therefore, we believe that the general Missouri statute governing the computation of time would apply. Section 1.040, RSMo 1969, states as follows:

"Computation of time. -- The time within which an act is to be done shall be com-

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puted by excluding the first day and including the last. If the last day is Sunday it shall be excluded."

CONCLUSION

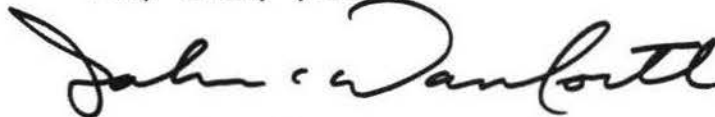
Therefore, it is the conclusion of this office that:

1. Under Section 168.126, RSMo 1969, a board of education need not give a probationary teacher ninety days notice prior to April 15 of its intention not to rehire the teacher because of incompetency in order to lawfully refuse to renew that probationary teacher's contract for the next school year;

2. The time periods in Sections 168.116 and 168.126, RSMo 1969, should be computed on the basis of calendar days excluding the first day and including the last in accordance with Section 1.040, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure:

Opinion No. 269, Fink, 5-13-71
Opinion No. 371, Mulvaney, 10-2-70
Opinion No. 178, Vaughan, 7-19-71

March 8, 1972

OPINION LETTER NO. 19
Answer by Letter - Burns

Mr. Joseph Jaeger, Jr.
Director of Parks
Missouri State Park Board
Post Office Box 176
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

This is in answer to your recent request asking whether the Park Board is authorized to spend for acquisition of real property during the 1971-1972 appropriation period the sum determined by application of the formula found in Section 47 of Article III of the Missouri Constitution out of the appropriations to the State Park Board for the fiscal year 1971-1972. There are no appropriations to the Park Board for real property acquisitions out of general revenue for such period.

Section 47 of Article III of the Constitution of Missouri provides as follows:

"For twelve years beginning with the year 1961, the general assembly shall appropriate for each year out of the general revenue fund, an amount not less than that produced annually at a tax rate of one cent on each one hundred dollars assessed valuation of the real and tangible personal property taxable by the state, for the exclusive purpose of providing a state park fund to be expended and used by the agency authorized by law to control and supervise state parks, and historic sites of the state, for the purposes of the acquisition, supervision, operation, maintenance, development, control, regulation and restoration of state parks and state park property, as may be determined by such agency;

Mr. Joseph Jaeger, Jr.

and thereafter the general assembly shall appropriate such amounts as may be reasonably necessary for such purposes.

"The amount required to be appropriated by this section may be reduced to meet budgetary demands provided said appropriation is not less than that appropriated for the prior similar appropriation period."

Under the clear provisions of Section 47 of Article III of the Constitution above quoted, the general assembly is mandatorily required to appropriate a minimum amount under the formula found in such section for the exclusive purpose of providing a state park fund to be expended and used by the agency authorized by law to control and supervise state parks and historic sites of the state for several purposes including acquisition of state parks and state park property as may be determined by the agency. The agency which has such power is the State Park Board, Section 253.020, RSMo. Application of the formula in such constitutional provision required that the legislature appropriate under such section for the fiscal year 1971-1972, at least the sum of \$1,133,911.63. In view of the fact that the previous years appropriation for park purposes out of the general revenue was greater than such amount, the last paragraph of such section has no application to the required appropriation for the fiscal year 1971-1972, and it follows therefore, that the constitutional mandate required a minimal appropriation, under Section 47 of Article III of the Constitution, of \$1,133,911.63 out of general revenue to be expended by the State Park Board for the various purposes listed in such section as may be determined by the Park Board. The appropriation by the legislature of an amount in excess of this figure out of the general revenue fund constituted a compliance by the general assembly with the constitutional requirement as to appropriations out of the general revenue fund for the State Park Board.

The question then arises as to the authority of the general assembly to provide in the appropriation acts that the moneys thereby appropriated to the State Park Board from the general revenue fund should be spent only for designated purposes, more limited in scope than those purposes set forth in Section 47 of Article III.

It is our view that to the extent of the appropriation from general revenue required to be made to the Park Board by the general assembly under the provisions of Section 47 of Article III of the Constitution, that is, the sum of \$1,133,911.63, the attempted limitation on the expenditure of such sum by the general assembly in the appropriation acts is unconstitutional, void and of no effect.

Mr. Joseph Jaeger, Jr.

It is our view that the Park Board has authority to spend the sum of \$1,133,911.63 out of the appropriations to the Park Board from general revenue for any purpose or purposes set forth in Section 47 of Article III of the Constitution in the discretion of the Park Board.

An analogous situation confronted the Michigan Supreme Court in 1942 when it was asked to rule on the validity of an appropriation containing a prohibition on salary increases for state civil service employees. That state's constitution established a civil service commission to "... classify all positions in the state civil service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions [and], approve or disapprove disbursements for all personal services. * * *" The constitution further directed the legislature to appropriate to the civil service commission annually a fixed amount computed on the preceding year's civil service payroll for the purpose of the commission executing its constitutional powers. The Michigan Supreme Court ruled, that, although the constitutional provision was not self-executing and was not itself an appropriation because it envisioned initiation of the appropriation by the legislature, still the constitution placed a mandatory duty upon the legislature to appropriate a minimum sum to the civil service commission without conditions usurping the authority vested in the commission to fix rates of compensation for the state civil service employees. The prohibition on salary increases attached to the appropriation was ruled invalid. Civil Service Commission of Michigan v. Auditor General, 5 N.W.2d 536 (Mich. 1942).

We need not consider whether Section 47 of Article III is a self-enforcing constitutional appropriation because the legislature discharged its constitutional duty to appropriate a certain minimum sum to the Park Board for the purposes stated in the Constitution and cannot as to this sum exercise the judgment which the Constitution has placed in the Park Board. Accordingly, it is our opinion that the Park Board may expend up to the amount of \$1,133,911.63 appropriated general revenue funds for the fiscal year 1971-1972 for any of the purposes specified in Section 47, Article III of the Missouri Constitution. The determination of the purpose or purposes for which such amount is to be expended is in the discretion of the Park Board. Real property acquisition is among such purposes.

Very truly yours,

JOHN C. DANFORTH
Attorney General

LIBRARIES:

The governing boards of county, city-county and municipal libraries are vested with the administrative authority of such libraries and are not under the direction of the officers or governing bodies of such cities or counties.

OPINION NO. 20

January 7, 1972

Mr. Charles O'Halloran
State Librarian
Missouri State Library
308 East High Street
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This opinion is in response to your request in which you ask the following:

"What is the legal relationship between a Library Board of Trustees (city, county, or city-county library) and the appointing authority (Mayor, County Court, or a combination of both) after the Library Board of Trustees is appointed?"

"Sections 70.210, 182.070, 182.200 (5) and 182.480 all appear to establish libraries as bodies corporate of the State. Sections 182.050, 182.170 and 182.291, provide for the appointment of trustees. The relationship of appointing body and body appointed after the appointment is unclear.

"We are aware of the specific requirements in the law for reports, of the process for filling vacancies, and of the custody of funds belonging to the library.

"Our question relates to the powers, actual or implied, which the appointing authority may have over decisions and acts of the Board of Trustees which has been appointed.

"Further, we would be interested in knowing, should your opinion be that a Library Board of Trustees does possess a high degree of legal

Mr. Charles O'Halloran

independence from its appointing body, your opinion on the obligation of the Library Board not only to assert that independence, but also to erect and establish those procedures and practices of operation which are appropriate to a highly independent public body."

"From time to time a County Court or a Mayor and Council may come into conflict with the Board of Trustees of a local library, a board originally appointed by the Court or the Mayor. This conflict often involves the right and authority of the County Court or the Mayor to influence or even to direct the actions of the Library Board. Thus, our question: to what extent can the County Court or Mayor, under the law, influence, direct, or dictate the decisions of a library board?"

We view your question as relating to those sections contained in Chapter 182, RSMo 1969, with respect to county library districts, Sections 182.010 to 182.130, RSMo; city libraries under Sections 182.140 to 182.280, RSMo; city-county libraries, Sections 182.291 to 182.301, RSMo, and municipal library districts, Sections 182.480 to 182.510, RSMo. Our conclusions with respect to the first three also pertain to municipal library districts which under Section 182.480 are political subdivisions of the State of Missouri and corporate bodies and which under Section 182.490 have powers similar to those of the other libraries.

For the sake of brevity we will not quote the sections cited and will not discuss the respective city or county governing bodies' powers of appointment of such board members as the power to appoint in our view is not relative to the duties of such boards.

In general, as you have indicated in your question, such library boards are bodies corporate and the statutes vest the authority for the execution of the laws dealing with such libraries in such boards. Nowhere do we find any reservation of powers to the governing body of the cities, counties or the respective officials of such cities or counties. While it is clear that in certain sections such as for an example Section 182.180, now applicable to municipal library districts, the mayor or other proper official by and with the consent of the legislative branch of the city government may remove any trustee for misconduct or neglect of duty, the power of removal and thus the power of ultimate control is limited in such instances to cases of misconduct or neglect of duty. Similar provisions respecting removal of county library board members were at one time contained within Section 182.050 but were omitted by amendment of such

Mr. Charles O'Halloran

section and therefore such board members may not be summarily removed. The board members do of course serve for definite terms.

It is also notable that elected county officials except as otherwise specified cannot serve on the county boards, Section 182.050, and members of the city government are not eligible to be members of such municipal library boards under Section 182.170.

Likewise, as stated in your question, city, county and city-county libraries are included within the definition of "political subdivision" as contained in Section 70.210, RSMo 1969, relating to cooperation by political subdivisions. Other cooperation provisions such as Section 182.301, relating to city and city-county library boards provide that the boards have the power to contract for cooperative service with the body having control of a city, county, school or other public library. The thrust of these statutes is that such library boards are autonomous and not subject to control, direct or indirect, by the officers of the governing bodies of the cities and counties.

Although the Supreme Court of Missouri in State v. Dwyer, 234 S.W.2d 604 (1950) held that the library considered in that case was an institution of the city, the provisions under consideration here in our view vest the full and undiminished statutory governing powers in such boards of trustees.

In answer to your second question, such boards having the power to execute the authority vested in them also have the corresponding duty to act sua sponte to accomplish the purposes for which they exist.

It should be clear that this opinion does not attempt to cover specific questions and if you have any particular questions involved each should be answered on an individual basis.

CONCLUSION

It is the opinion of this office that the governing boards of county, city-county and municipal libraries are vested with the administrative authority of such libraries and are not under the direction of the officers or governing bodies of such cities or counties.

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH
Attorney General

SCHOOLS:
JUNIOR COLLEGES:
CONSTITUTIONAL LAW:-
TAXATION (SALES AND USE):

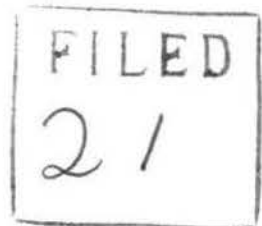
A junior college district in Missouri is an institution of higher education supported by public funds, as that term is used in Section 144.040.2, Senate Bill No. 72, Seventy-sixth General Assembly; and Section

144.040, Senate Bill No. 72, Seventy-sixth General Assembly, which does not exempt institutions of higher education supported by public funds from collecting sales tax on retail sales made by them, is constitutional. Therefore, it is our opinion that every junior college district must collect state sales tax on retail sales it makes after September 28, 1971.

OPINION NO. 21

March 10, 1972

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This official opinion is issued in response to your request for a ruling on whether a public junior college district is required to collect and pay the state sales tax on retail sales it makes after September 28, 1971.

Your request was prompted by a notice sent to all public junior colleges by the Department of Revenue of the State of Missouri on September 9, 1971, stating that institutions of higher education supported by public funds must collect and remit to the Department of Revenue the 3 per cent state sales tax on retail sales. From information you supplied to this office, we understand that most of the retail sales made by junior college districts take place in bookstores and cafeterias located on their campuses.

The Department of Revenue's notice of September 9, 1971, was based on Section 144.040, Senate Bill No. 72, Seventy-sixth General Assembly. Senate Bill No. 72 repealed Section 144.040, RSMo 1969, relating to exemptions from the sales tax and enacted a new Section 144.040 in its place. To facilitate comparison, the repealed and new sections are set forth below.

Section 144.040, RSMo 1969 (repealed) stated:

"In addition to the exemptions under section 144.030 there shall also be exempted from the provisions of sections 144.010 to 144.510 all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the department of

Dr. Arthur L. Mallory

penal institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a state relief agency in the exercise of relief functions and activities."

Section 144.040, Senate Bill No. 72, Seventy-sixth General Assembly provides:

"1. In addition to the exemptions under section 144.030, there shall also be exempted from the provisions of sections 144.010 to 144.510, all sales made by or to religious and charitable organizations or institutions and all sales made by and to all elementary and secondary schools operated at public expense, in their religious, charitable or educational functions and activities.

"2. There shall also be exempted from the provisions of sections 144.010 to 144.510 all sales made to eleemosynary and penal institutions and industries of the state, and all sales made to any institution of higher education supported by public funds, and all sales made to a state relief agency in the exercise of relief functions and activities."

The repealed section exempted from the sales tax all sales made by or to educational institutions supported by public funds in the conduct of regular educational functions and activities. The new section exempts from the sales tax all sales made by and to elementary and secondary schools operated at public expense, in their educational functions and activities, and exempts all sales made to any institution of higher education supported by public funds. By implication, all sales made by any institution of higher education supported by public funds are no longer exempt from the state sales tax.

Initially, we must decide whether a junior college district is an institution of higher education or a secondary school. If a junior college district is an institution of higher education supported by public funds, it would not be exempt from collecting the state sales tax, assuming Section 144.040 is constitutional.

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As used in the Missouri statutes, the term "secondary school" appears to be synonymous with "high school". "'High school' means a public school giving instruction in two or more grades not lower than the ninth nor higher than the twelfth grade." Section 160.011(6), RSMo 1969. (Emphasis added.) The Elementary and Secondary Education Act of 1965 defines "secondary school" as ". . . a day or residential school which provides secondary education as determined under state law, except that it does not include any education provided beyond grade 12." 20 U.S. C. Section 244 (1970).

In Missouri, a junior college district provides education for students who have completed high school. Among the standards for the organization of junior college districts is "whether there were a sufficient number of graduates of high school. . . ." Section 178.770.1(3), RSMo 1969 (Emphasis added). Junior college districts in Missouri are designed to provide two years of post-high school education (thirteenth and fourteenth year courses). See Sections 178.770.1, 178.780.2 and 178.800, RSMo 1969.

"A junior college district organized under Sections 178.770 to 178.890 shall provide instruction, classes, school or schools for pupils resident within the junior college district who have completed an approved high school course. . . ." Section 178.850, RSMo 1969. (Emphasis added.)

The State Board of Education has defined the public junior college as "a public educational institution offering instruction, beyond a four-year standard high school course, in programs of two years' duration. Primarily, these programs are at the collegiate level. . . ." See "Public Junior Colleges in Missouri", State Board of Education.

Furthermore, the Commission on Higher Education has the responsibility for making various recommendations "to the governing boards of state-supported institutions of higher education, including public junior colleges receiving state support" Section 173.030(3), RSMo 1969. (Emphasis added.)

The Higher Education Act of 1965 defines an "institution of higher education" as "an educational institution in any State which (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, . . . (2) is legally authorized within such State to provide a program of education beyond secondary education, (3) provides an educational program for which it awards a bachelor's degree or provides not less than a two-year program which is acceptable

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for full credit toward such a degree. . . ." 20 U.S.C. Section 403 (1970). (Emphasis added.)

Therefore, we conclude that a junior college district is not a secondary school as that term is used in Section 144.040 and is an institution of higher education as that term is used in subsection 2 of Section 144.040. See, generally, Opinion No. 239, Hearn, April 26, 1966.

Having determined that junior college districts are institutions of higher education supported by public funds, we must now consider whether Section 144.040 is constitutional as applied to institutions of higher education, including junior college districts. Three primary arguments might be made concerning the constitutionality of this section. The first is that in attempting to tax sales made by institutions of higher education and exempting such sales by secondary schools, the Missouri constitutional provision prohibiting special laws has been violated. Secondly, it could be argued that the legislature is in effect taxing the junior college districts in violation of Article III, Section 39 (10). The third argument would be that the sales tax is in part a tax on the junior college district, a political subdivision of the State, in violation of Article X, Section 6.

In analyzing the constitutionality of a statute, it is important to remember that all legislation enacted by the Missouri General Assembly is presumed to be constitutional and that the burden is on the one seeking to attack the constitutionality to demonstrate its invalidity. State ex rel. Priest v. Gunn, 326 S.W.2d 314, 324 (Mo. en banc, 1959).

When the legislature repealed the blanket exemption of all sales made by or to educational institutions supported by public funds, it created a distinction between elementary and secondary schools operated at public expense and institutions of higher education supported by public funds. As has previously been pointed out, the legislature distinguished between elementary and secondary schools and institutions of higher education by refusing to exempt from the state sales tax retail sales made by institutions of higher education. Does this distinction infringe on the Missouri prohibition against the enactment of special legislation contained in Article III, Section 40(30)?

"Limitations on passage of local and special laws. The general assembly shall not pass any local or special law:

* * *

"(30) where a general law can be made applicable, and whether a general law

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could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject."

Article III, Section 40, Missouri Constitution, 1945.

Neither the Equal Protection Clause of the United States Constitution nor Article III, Section 40 of the Missouri Constitution prevents the legislature from making reasonable classifications of persons or things in furtherance of the purpose of a particular piece of legislation. In St. Louis Union Trust Co. v. State, 155 S.W.2d 107, 112 (Mo., 1941), the Court set forth the general rules governing legislative classifications:

". . . 'That part of the Fourteenth Amendment to the Federal Constitution reading as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" -- has been construed to prevent the enactment of state statutes which make any unreasonable or arbitrary discrimination between different persons or different classes of persons. [Citations omitted.] Neither the Federal Constitution or section 53, article 4 [prohibiting special and local laws], of the Missouri Constitution prevents the making of reasonable classifications of persons or things for the various purposes of legislation. [Citations omitted.] If there is a reasonable ground for the classification and the law operates equally on all within the same class, it is valid. [Citations omitted.] The question of classification being primarily one for the Legislature, it is the duty of the courts to sustain it if there is any reasonable basis for the classification. [Citations omitted.] An act of the Legislature should not be declared unconstitutional unless it appears beyond a reasonable doubt that it is in contravention of the Constitution. [Citations omitted.]'" Id. at 112.

In State v. Smith, 184 S.W.2d 593 (Mo. en banc, 1945), the Court stated as follows:

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". . .The question of classification is a practical one. A law may be directed to that class which is deemed to have the greater need for it. There may be omissions from the application of the law; the entire possible field does not have to be covered. There is bound to be some inequality resulting from any classification but unless it is unreasonable and arbitrary the classification must be approved. . . ." Id. at 596.

We do not believe that a court would find that beyond a reasonable doubt this statute violates Article III, Section 40(30). There would appear to be ample basis for a court to find that the legislature reasonably distinguished between elementary and secondary schools, and institutions of higher education. The legislature could have found that many institutions of higher education have significant retail selling operations such as bookstores which directly and significantly compete with businesses. The legislature might have concluded that this loophole in the coverage of the sales tax should be closed. On the other hand, the legislature could have concluded that most elementary and secondary schools do not have significant retail selling operations directly competing with retail businesses in their communities. Therefore, we believe that under the rules set forth by the Missouri Supreme Court in the St. Louis Union Trust Co. case, the exemptions in Section 144.040 do not violate either Article III, Section 40, Missouri Constitution, or the Equal Protection Clause, Fourteenth Amendment, United States Constitution.

With reference to the second possible argument which could be made against the constitutionality of Senate Bill No. 72, the Missouri Constitution prohibits the general assembly from imposing "a use or sales tax upon the use, purchase or acquisition of property paid for out of the funds of any county or other political subdivision." Article III, Section 39(10). We have concluded in another context that a junior college district is a political subdivision of the State of Missouri. See Opinion No. 425, Norris, December 14, 1971, and Section 178.770.2, RSMo 1969.

However, the state sales tax to be collected and remitted on retail sales made in bookstores and cafeterias located on campuses of junior college districts is not a tax on the use (as that term is used in the Compensating Use Tax Law, Section 144.500, et seq.), purchase or acquisition of property, so the prohibition of Section 39(10) is not violated.

This conclusion is not altered by consideration of the 1965 amendments to the Sales Tax Act (Sections 144.020, 144.021, 144.080) which made the sales tax a gross receipts tax and im-

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posed it on the seller for the privilege of engaging in business. The tax is still not assessed on the "use, purchase or acquisition of property" by the political subdivision. At the very most, it is a tax on the privilege of selling at retail which is not prohibited by Section 39(10), Article III.

Similarly, requiring the junior college districts of the State of Missouri to collect this tax does not amount to taxation of the property of a political subdivision of the state in violation of Article X, Section 6. Article X, Section 6 provides:

"Exemptions from taxation. All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

No property of the junior college district is being taxed by requiring the district to collect a sales tax from a consumer. See State ex rel. Missouri Portland Cement Co. v. Smith, 90 S.W.2d 405, 407 (Mo. en banc, 1936), where the Court concluded that the sales tax is not a property tax. Furthermore, the incidence of this tax, regardless of whether it is an excise tax or gross receipts tax, falls on the consumer. See Opinion No. 365, McGhee, October 26, 1967, in which this office concluded that the 1965 amendments to Chapter 144 did not relieve a public water district from collecting sales tax from consumers to whom it sells water and remitting same to the Department of Revenue.

In addition, the theory underlying exemption of state property from taxation -- that such taxation would merely be taking money out of one pocket and putting it into another -- would not apply here as it did in the Missouri Portland Cement case. In the instant situation, the sales tax will be paid by the consumer and will furnish additional revenue to the state.

CONCLUSION

We conclude that a junior college district in Missouri is an institution of higher education supported by public funds, as

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that term is used in Section 144.040.2, Senate Bill No. 72, Seventy-sixth General Assembly; and that Section 144.040, Senate Bill No. 72, Seventy-sixth General Assembly, which does not exempt institutions of higher education supported by public funds from collecting sales tax on retail sales made by them, is constitutional. Therefore, it is our opinion that every junior college district must collect state sales tax on retail sales it makes after September 28, 1971.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure:

Opinion No. 239, Hearnese, 4-26-66
Opinion No. 365, McGhee, 10-26-67
Opinion No. 425, Norris, 12-14-71

BANKS:

RULES AND REGULATIONS:

Rules and regulations proposed by the Commissioner of Finance providing that state banks and trust

companies may purchase securities of a corporation carrying on a project which is predominantly service, community or public in nature when such purchase has been authorized by the Comptroller of the Currency as a proper investment for national banking associations are a valid exercise of his rule making authority and may be enacted if approved by the State Banking Board.

OPINION NO. 22

May 22, 1972

Mr. H. Duane Pemberton
Commissioner of Finance
Division of Finance
P. O. Box 716
Jefferson City, Missouri 65101



Dear Mr. Pemberton:

This is in response to your request for an opinion as to the legality of two proposed rules and regulations which you have submitted to the State Banking Board for its approval. The proposed rules and regulations and the accompanying preamble are as follows:

"WHEREAS, the American Bankers Association has formed a special corporation known as Minbanc Capital Corporation to make needed capital funds available to qualifying minority-owned banks, the shares in which company are being offered exclusively to banks; and

"WHEREAS, the President of the United States, the Comptroller of the Currency, the Federal Reserve Board and the Federal Deposit Insurance Corporation have lauded the utilization of this corporation and have urged the participation of all banks; and

"WHEREAS, the Comptroller of the Currency has authorized the purchase of stock in the corporation by national banks under the provisions of Section 7.7480 of the Comptroller's Manual and the provisions of Paragraph Eighth of 12 U.S.C. 24; and

Mr. H. Duane Pemberton

"WHEREAS, the Commissioner of Finance is empowered, under the provisions of Subsection 3. of Section 362.105, RSMo, with the approval of the State Banking Board, to issue orders granting such other powers and authorities as have been granted to financial institutions subject to the supervision of the Federal Government and which are necessary to enable banks and trust companies to compete; now therefore

"The Commissioner of Finance of the State of Missouri hereby adopts the following:

"170-1. Investment in Civic, Community or Public Projects.

1. In addition to the loans and purchases of securities authorized under Section 362.170, RSMo, banks and trust companies may purchase the securities of a corporation carrying on a project which is predominantly service, community or public in nature, and not merely private or entrepreneurial.
2. The investment of any bank or trust company in any one project shall not exceed two (2) percent of its capital and surplus.
3. No such investment shall be authorized unless it has first been authorized by the Comptroller of the Currency as a proper investment for national banking associations.
4. The Commissioner of Finance and the State Banking Board shall approve the name of any corporation eligible for investments under the provisions of this regulation.

H. Duane Pemberton
Commissioner of Finance

Approved: State Banking Board

By: _____

Mr. H. Duane Pemberton

Date: _____, 1971

Effective Date: _____

"170-1. (A) Minbanc Capital Corporation

1. The shares of Minbanc Capital Corporation are approved for purchase by banks and trust companies under the provisions of Section 170-1. of the Rules and Regulations of the Commissioner of Finance, State of Missouri.

H. Duane Pemberton
Commissioner of Finance

Approved: State Banking Board

By: _____

Date: _____, 1971

Effective Date: _____"

Generally, a Missouri state bank is prohibited from investing in or holding for investment purposes the stock of a private corporation by Section 362.170.1(7), RSMo 1969, which provides:

"1. No bank or trust company subject to the provisions of this chapter shall

* * *

"(7) Invest or keep invested in the stock of any private corporation, except as provided in subsection 2."

The prohibition in Section 362.170.1(7), RSMo, uses the words "invest" and "investment" with respect to the stock of a private corporation. We find it significant that these statutes do not absolutely prohibit the purchase or ownership of stock of a private corporation. The words "invest" and "investment" are not expressly defined in the Missouri banking law. The word "invest" has the following dictionary definitions:

Mr. H. Duane Pemberton

"1: to commit (money) in order to earn a financial return 2: to make use of for future benefits or advantages" (Webster's Seventh New Collegiate Dictionary)

"1a: to commit (money) for a long period in order to earn a financial return . . ."
(Webster's New Third International Dictionary)

"To loan money upon securities of a more or less permanent nature, or to place it in business ventures or real estate, or otherwise lay it out, so that it may produce a revenue or income. . . ." (Citing Drake v. Crane, 127 Mo. 85, 29 S.W. 990 (1895); Black's Law Dictionary (4th Edition))

Each of those definitions emphasizes the concept of expectation of financial gain or return. With respect to the Minbanc Corporation, you have informed this office that the purpose of that corporation is to assist and promote minority owned banks. You further indicate that banks will not acquire stock in the Minbanc Corporation with the primary expectation of earning a financial return on such stock. You indicate the banks would purchase stock of Minbanc Corporation out of a sense of social commitment and a desire to assist minority owned banks in contributing to the economic development of, and in rendering more effective service to, communities in which they are located.

Since banks would not be acquiring stock of the Minbanc Corporation with the intention of earning income or return upon their investment, but rather with the intention of assisting minority banks to better serve minority communities, we are of the opinion that acquisition of Minbanc Corporation stock by a bank in this state would not be an investment in the stock of a private corporation which is prohibited by Section 362.170.1(7), RSMo.

We further note that while national banks are prohibited from acquiring shares of stock of private corporations by the provision of 12 U.S.C. 24, the United States Comptroller of the Currency has approved the acquisition of shares of Minbanc Corporation (Comptroller's Manual, Interpretative Rulings, 7.7480). Similarly, the Board of Governors of the Federal Reserve System has ruled that the acquisition of shares in the Minbanc Corporation by state member banks is not prohibited by the prohibition on state member banks acquiring stock contained in 12 U.S.C. 335.

Your proposed rules and regulations 170-1 and 170-1 (A) are proposed under Section 362.105.3, RSMo 1969, which provides:

Mr. H. Duane Pemberton

"In addition to the powers and authorities granted in this section, the commissioner of finance may, from time to time, with the approval of the state banking board, issue orders granting such other powers and authorities as have been granted to financial institutions subject to the supervision of the federal government and which are necessary to enable banks and trust companies to compete. The orders shall be promulgated as provided in section 361.105, RSMo, and shall not be inconsistent with the constitution and the laws of this state."

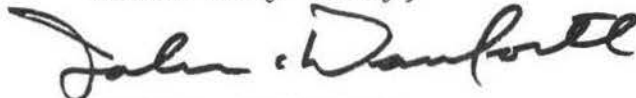
Inasmuch as national banks are permitted by the Comptroller of the Currency to invest in the Minbanc Capital Corporation and similar corporations, we believe that you, in your discretion, are warranted in concluding that such investments are necessary to enable state banks and trust companies to compete with the national banks. Furthermore, because we have found that investments of the type covered in your proposed rules and regulations are not prohibited by Section 362.170.1(7), RSMo, or other statutory or constitutional provisions, we find that your proposed rules and regulations are not inconsistent with the Constitution or the laws of this state.

CONCLUSION

It is the opinion of this office that rules and regulations proposed by the Commissioner of Finance providing that state banks and trust companies may purchase securities of a corporation carrying on a project which is predominantly service, community or public in nature when such purchase has been authorized by the Comptroller of the Currency as a proper investment for national banking associations are a valid exercise of his rule making authority and may be enacted if approved by the State Banking Board.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

ROADS & BRIDGES:
STATE HIGHWAYS:
OUTDOOR ADVERTISING:
CONSTITUTIONAL LAW:

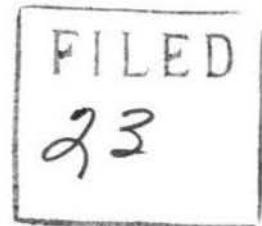
1. The State Highway Commission may not utilize state road or highway fund moneys to defray the cost of the administration of a system of permits for the regula-

tion of outdoor advertising. 2. The adoption of the permit system by the State Highway Commission is mandatory under Section 226.550, RSMo Supp. 1971. 3. Regulations for a permit system for outdoor advertising need not be adopted by the State Highway Commission and filed with the Secretary of State prior to such system's becoming effective. 4. Section 226.550, RSMo Supp. 1971, provides that permits be issued on a one-time basis. 5. Permits are specifically required only for the outdoor advertising specified in Section 226.520(5), RSMo 1969. Pre-existing signs that come within this provision are subject to permit regulation. Other pre-existing and non-conforming signs, subject to removal under Sections 226.560 and 226.580, RSMo 1969, need not obtain permits. 6. Section 226.550, RSMo Supp. 1971, refers to subparagraph (5) of Section 226.520, RSMo 1969. Therefore, outdoor advertising located in unzoned commercial or industrial areas, as defined and determined pursuant to Sections 226.500 to 226.600, RSMo 1969, is required to have a permit.

OPINION NO. 23

February 1, 1972

Honorable Thomas D. Graham
Representative, District No. 12
Room 317, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Graham:

Recently you requested an opinion from this office that asked the following questions:

"a. May the State Highway Commission in view of Section 226.590, RSMo., utilize state road or highway fund monies to defray the costs of the administration of a system of permits for outdoor advertising under Section 226.550, RSMo? If not, may such a system of permits be maintained without a special appropriation?

"b. May state road fund monies be used to defray the expenses in administering a system of permits for outdoor advertising or any other expenses in connection with the administration of the provisions of Sections

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226.500 through 226.600, RSMo., even though Section 226.590, RSMo., might be amended to purport to permit the use of road fund moneys for such purposes?

"c. Is the adoption of a permit system by the State Highway Commission mandatory or permissive under Section 226.550, RSMo.? If such system is permissive, what action must the State Highway Commission take to legally adopt such a system?

"d. Must regulations for a permit system for outdoor advertising be adopted by the State Highway Commission and filed with the Secretary of State prior to such system's becoming effective? In this respect, your attention is directed particularly to Sections 226.500 and 226.530, RSMo., and Section 536.020, RSMo.

"e. Does Section 226.550, RSMo., provide for a one-time permit or provide for permits to be renewed periodically? If such provides for permits to be renewed periodically, for what length of time does a permit or a renewal permit run?

"f. Are permits required under Section 226.559, RSMo., for signs erected prior to January 1, 1968, and in particular, prior nonconforming signs?

"g. Taking into consideration the reference in Section 226.550, RSMo., to outdoor advertising 'permitted by sub-paragraph d of paragraph (b) of Section 226.520', what signs may be required to have a permit under the provisions of Section 226.550, RSMo.?"

Your first two questions:

"a. May the State Highway Commission in view of Section 226.590, RSMo., utilize state road or highway fund monies to defray the costs of the administration of a system of permits for outdoor advertising under Section 226.550, RSMo.? If not, may such a system of permits be maintained without a special appropriation?

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"b. May state road fund monies be used to defray the expenses in administering a system of permits for outdoor advertising or any other expenses in connection with the administration of the provisions of Sections 226.500 through 226.600, RSMo., even though Section 226.590, RSMo., might be amended to purport to permit the use of road fund moneys for such purposes?"

compel an examination of Chapter 226 of the Missouri Revised Statutes.

Section 226.590, RSMo 1969, states:

"The state highway commission is authorized to use any funds, appropriated to it or received by it from other than the state road fund for matching federal funds or for other lawful purposes of sections 226.500 to 226.600."

This provision specifically prohibits the use of state road funds to defray the cost of administering an outdoor advertising system. The alternative remaining for the funding of such an administrative system is an appropriation by the legislature.

The silence of the legislature on the source of funds to administer the program should not be construed to indicate that the act would not be administered. If the legislature deemed it necessary, it could make a special appropriation for the administration of the outdoor advertising program. Section 226.590 authorizes the Highway Commission to use funds appropriated to it. Since the act directs permit fees to be deposited in the general revenue fund, the legislature probably intended to appropriate funds specially for the administration of the permit system.

Absent an appropriation, may the Highway Department fund be used to meet the cost of administering the system? Section 226.200 establishes a State Highway Department fund implementing Article IV, Section 30(b) of the Missouri Constitution. This fund permits payments, among other uses, for the maintenance of the State Highway Commission. Can this be construed to allow the Commission to administer the system with these funds?

Application of the principles expressed in certain recent decisions interpreting constitutional provisions dealing with the expenditure of highway moneys compels this question to be answered in the negative.

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The relationship of the subsections of the constitutional provision cited previously to the regulation of outdoor advertising can be better understood by the application of principles stated in certain recent Missouri decisions. The recent decision of Pohl v. State Highway Commission, 431 S.W.2d 99 (Mo. banc 1968), dealing with toll road legislation, espouses the principle that a narrow interpretation should be placed on these constitutional provisions dealing with the expenditure of highway moneys. In the Pohl case, the court interpreted the scope of subsection (5), the subsection that arguably might provide the basis for such an expenditure. Subsection (5) permits highway fund expenditures:

"For such other purposes and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the commission may deem necessary and proper."

The court stated that:

". . . this subsection must be considered along with what immediately precedes it in subsections (1) through (4) of § 30(b). When so read and considered, it is plain that any authority or power conferred by subsection (5) is clearly limited to the accomplishing of additional discretionary matters in connection with the highways and bridges specified in subsections (1) through (4), which do not include toll roads. . . ." (Pohl, supra, at 105)

The St. Louis Court of Appeals, in State ex rel. State Highway Commission v. Pinkley (unreported decision issued September 28, 1971), rejected the contention of the State Highway Commission that Article IV, Section 30(b) (5) authorizes the Commission to provide a rest area abutting a state route, holding that subsection (5) did not grant any new or unspecified power.

Subsection (1) permits expenditures:

"To complete and widen or otherwise improve and maintain the state system of highways heretofore designated and laid out under existing laws;"

The language used in this subsection clearly envisages use of funds for construction and maintenance of the roadway itself and adjacent roadway maintenance. The stated purpose of the Highway Beautification Act and the concept of billboard regulation are not directly related to the purposes stated by this constitutional provision.

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The result and principles expressed by the Pohl decision must be contrasted with another line of cases that permit a flexible, expansive interpretation of legislation in order to meet federal objectives. The Missouri Highway Beautification Act was passed in response to federal controls on outdoor advertising (23 U.S.C. 131 et seq). Unless a state provides an effective means of billboard control, federal aid highway fund payments to the state will be reduced by ten percent. When a state enacts legislation to secure federal aid, the statutes enacted to effectuate the purpose to be served by the legislation must be construed together with the federal statutes so that the purposes of the legislation will not be thwarted. Davis Construction Co. v. State Highway Commission, 141 S.W.2d 214 (K.C.Ct.App. 1940); Woolley v. State Highway Commission, 387 P.2d 667 (Wyo. 1963).

Subsection (3) of Article IV, Section 30(b) of the Missouri Constitution permits the State Highway Commission to "locate, re-locate, establish, acquire, construct and maintain," "(d) any highway within the state when necessary to comply with any federal law or requirement which is or shall become a condition to the receipt of federal funds;". Either this subsection or subsection (5), or the subsections in conjunction, would provide the only basis for legal expenditures from the state road fund for the regulation of outdoor advertising. To arrive at this conclusion, the term "maintain" would have to be given an expansive definition. In construing words and phrases, Section 1.090, RSMo 1969, directs that words and phrases shall be taken in their plain and ordinary and usual sense. Therefore, the conclusion is inescapable that the word "maintain," as used in the constitutional provision previously referred to, is synonymous with the term "repair." Such a conclusion was reached in the decision of Barber Asphalt-Pav. Co. v. Hezel, 56 S.W. 449, 451 (Mo. banc 1900).

In a related decision, the Supreme Court of Idaho held that where, as here, a constitutional provision and statute when read together, specifically permit the use of moneys for particular purposes, such funds cannot be used for any other purpose, although such purpose bears some relation to highway matters. State v. Jonasson, 299 P.2d 755 (Ida. 1956).

The principles stated in response to question "a" are applicable to question "b" also. To determine whether state road fund moneys may be used to administer a system regulating outdoor advertising, one is referred by Section 226.220, RSMo 1969, to the constitutional limitations specified by Article IV, Section 30(b) of the Constitution of Missouri. Despite the obvious need to comply with federal standards, specific Missouri constitutional and statutory provisions cannot be disregarded. Thus, Article IV, Section 30(b) of the Missouri Constitution prohibits the use of state road fund moneys for the administration of a system of billboard regulation.

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In summary, special appropriations are necessary to defray the cost of administering the system of billboard regulation authorized by Sections 226.500, et seq. State highway and road fund monies may not be used to defray the cost of administering this system.

"c. Is the adoption of a permit system by the State Highway Commission mandatory or permissive under Section 226.550, RSMo.? If such system is permissive, what action must the State Highway Commission take to legally adopt such a system?"

Section 226.550, in relevant part, states:

"On and after January 1, 1968, the state highway commission is hereby authorized to collect fees hereinafter specified for the issuance of permits for outdoor advertising . . ."

To determine whether such a permit system is mandatory or permissive one must also look at Section 226.530, which states in relevant part:

"The state highway commission is authorized to issue permits for the erection and maintenance of outdoor advertising along the interstate and primary highway systems and subject to section 226.540 to promulgate only those rules and regulations of minimal necessity and consistent with customary use to secure to this state any federal aid contingent upon compliance with federal laws, rules and regulations relating to outdoor advertising. . . ."

In interpreting these statutes, one must give meaning to the phrase "is authorized to." The meaning of the term "authority" and its derivatives have been the subject of much litigation. See 4a, Words and Phrases, 601-604. The courts of Missouri have never offered a definitive definition applicable to this situation. However, in the case of Dickensheet v. Chouteau Mining Co., 202 S.W. 624 (Spr.Ct.App. 1918), the court observed:

"We know that an ordinance authorizing and empowering the mayor or marshal of a city to keep and preserve the peace is mandatory, and involves a duty on the part of said officers. On the other hand, an ordinance, authorizing and empowering the officers of a city to own

Honorable Thomas D. Graham

and operate public utilities, would not be taken as mandatory, but as merely giving them the right or the permission to do so in their discretion. . . ." (202 S.W. at 626)

Given the principles expressed by the Dickensheet case and the statement of purpose of this legislation (Section 226.500), stating that it is necessary to regulate and control outdoor advertising, the use of the term "is authorized to" has a mandatory meaning in the context of Section 226.550.

"d. Must regulations for a permit system for outdoor advertising be adopted by the State Highway Commission and filed with the Secretary of State prior to such system's becoming effective? In this respect, your attention is directed particularly to Sections 226.500 and 226.530, RSMo., and Section 536.020, RSMo."

The purpose of the act states:

". . . The general assembly further declares it to be the policy of this state that the erection and maintenance of outdoor advertising in areas adjacent to the interstate and primary highway systems be regulated in accordance with sections 226.500 to 226.600 and rules and regulations promulgated by the state highway commission pursuant thereto." (Section 226.500, RSMo 1969)

Section 226.530, RSMo 1969, directs the State Highway Commission:

". . . to promulgate only those rules and regulations of minimal necessity and consistent with customary use to secure to this state any federal aid contingent upon compliance with federal laws, rules and regulations relating to outdoor advertising. . . ."

The act does not state that its effectiveness is to be contingent upon the issuance of regulations by the State Highway Commission. The terms of the act are specific enough to permit the Commission to engage in regulation and gives notice to outdoor advertisers of their legal obligations. For example, Section 226.550 authorizes the State Highway Commission to collect fees for the issuance of permits. It directs that forms for the application of permits shall be furnished by the State Highway Commission. It specifies permit

Honorable Thomas D. Graham

fees. Such specificity indicates that it was not mandatory for the Commission to promulgate rules to make the act effective. 73 C.J.S., Public Administrative Bodies, Section 96.

The statutory scheme for regulation of outdoor advertising does not direct that regulations shall be promulgated prior to the effectiveness of the act. As stated above, the act specifically requires that any regulations be only those essential to create a system of regulations consistent with federal legislation and regulations on the subject of outdoor advertising. Pursuant to the authority granted by Section 226.550, the Highway Commission could issue forms necessary for permit application and direct applicants to consider the statutory requirements in applying for their permits. Therefore, the permit system can be administered on the basis of the statutory language without the promulgation of rules and regulations.

"e. Does Section 226.550, RSMo., provide for a one-time permit or provide for permits to be renewed periodically? If such provides for permits to be renewed periodically, for what length of time does a permit or a renewal permit run?"

Section 226.550, establishing fees for permitted outdoor advertising, does not state the period for which a permit would be valid. The State Highway Commission is authorized to collect fees ". . . on or after January 1, 1968 . . ." The intent of the legislature is unclear concerning the length of time a permit would be valid. The low monetary amount required for the issuance of a permit for each type of sign does create an inference that a periodic scheme of regulation was intended.

No regulations were adopted concerning the permit period. To promulgate such a rule, imposing a permit period, the Commission can only act pursuant to authority granted by the legislation. Absent a legislative determination of a specific permit period, one could not be created by rule. State ex rel. Springfield Warehouse & Transfer Co. v. Public Service Commission, 225 S.W.2d 792 (K.C.Ct.App. 1949).

Although the statutes regulating outdoor advertising are not strictly "in pari materia" (see e.g., Bernhardt v. Long, 209 S.W.2d 112 (Mo. 1948)) with those regulating "junkyards," both statutes were passed by the 1965 General Assembly and adopted contrasting language concerning the duration of permits. Junkyard operators specifically must obtain annual permits. Section 226.670, RSMo 1969. In view of the presence of such a period in that act, its absence in this act indicates that the legislature intended the permit to be issued on a one-time basis.

Honorable Thomas D. Graham

"f. Are permits required under Section 226.550, RSMo., for signs erected prior to January 1, 1968, and in particular, prior nonconforming signs?"

To ascertain the answer to this question, initially one must determine what signs are encompassed within the permit plan of Section 226.550. The relevant statutory language is:

"On and after January 1, 1968, the state highway commission is hereby authorized to collect fees hereinafter specified for the issuance of permits for outdoor advertising permitted by subdivision (5) of section 226.520. . . ."
(Section 226.550, RSMo Supp. 1971)

Therefore, the terms of Section 226.550 are applicable to outdoor advertising located in unzoned commercial or industrial areas as defined and determined pursuant to Sections 226.500 to 226.600.

Permits are specifically required only for the outdoor advertising specified in Section 226.520(5). Other pre-existing and non-conforming signs, subject to removal under Sections 226.560 and 226.580, need not obtain permits. Since the language of the act encompasses signs in existence in unzoned commercial or industrial areas erected prior to the effective date of the act, permits are required for such outdoor advertising. Section 226.550 refers to outdoor advertising permitted by subparagraph (5) of Section 226.520. Since pre-existing uses would be permitted under this provision, they are subject to the requirement that a permit be obtained.

"g. Taking into consideration the reference in Section 226.550, RSMo., to outdoor advertising 'permitted by subparagraph d of paragraph (b) of Section 226.520', what signs may be required to have a permit under the provisions of Section 226.550, RSMo.?"

The answer to this question is stated in the response to the prior question "f." The statutory reference in your question "subparagraph d of paragraph (b) of Section 226.520," was a revisor's error. As noted in the response to your preceding question, the correct reference is stated by Section 226.550, RSMo Supp. 1971. Thus, outdoor advertising located in unzoned commercial or industrial areas is governed by the permit system.

CONCLUSION

It is the conclusion of this office that:

Honorable Thomas D. Graham

1. The State Highway Commission may not utilize state road or highway fund moneys to defray the cost of the administration of a system of permits for the regulation of outdoor advertising.

2. The adoption of the permit system by the State Highway Commission is mandatory under Section 226.550, RSMo Supp. 1971.

3. Regulations for a permit system for outdoor advertising need not be adopted by the State Highway Commission and filed with the Secretary of State prior to such system's becoming effective.

4. Section 226.550, RSMo Supp. 1971, provides that permits be issued on a one-time basis.

5. Permits are specifically required only for the outdoor advertising specified in Section 226.520(5). Pre-existing signs that come within this provision are subject to permit regulation. Other pre-existing and non-conforming signs, subject to removal under Sections 226.560 and 226.580, RSMo 1969, need not obtain permits.

6. Section 226.550, RSMo Supp. 1971, refers to subparagraph (5) of Section 226.520, RSMo 1969. Therefore, outdoor advertising located in unzoned commercial or industrial areas, as defined and determined pursuant to Sections 226.500 to 226.600, RSMo 1969, is required to have a permit.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Peter H. Ruger.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

March 30, 1972

OPINION LETTER NO. 25
Answer by letter-Curtis



Mr. James Flanagan, Chairman
Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri 65101

Dear Mr. Flanagan:

This is in reply to your opinion request asking whether individuals, associations, or corporations, who operate services commonly known as "multiple listing" or "multi-list" are required to be licensed as real estate brokers pursuant to Chapter 339, RSMo 1969.

It is our understanding that multiple listing is a service based on an agreement among real estate brokers in a given area whereby member brokers are authorized to sell any real property that is originally listed with another member broker. Multiple listing groups are commonly incorporated or organized as associations. The corporations and associations promulgate rules and regulations to guide their member brokers. Normally, when a real estate broker obtains a new listing he reports it to his organization's central office or bureau. The multi-list bureau then disseminates the listing information to the other member brokers. When a sale is made the selling broker usually pays a small percentage of his commission to the multiple listing corporation. Some multiple listing organizations simply charge their brokers a fixed annual, or monthly, or unit charge. All members of multiple listing organizations are individually licensed to act as real estate brokers.

The issue is whether the conduct of the multiple listing organizations is such as to come within the definition of a real estate broker found in Section 339.010, RSMo 1969:

Mr. James Flanagan

"A 'real estate broker' is any person, co-partnership, association or corporation, foreign or domestic, who advertises, claims to be or holds himself out to the public as a real estate broker or dealer and who for a compensation or valuable consideration, as whole or partial vocation, sells or offers for sale, buys or offers to buy, exchanges or offers to exchange the real estate of others; or who leases or offers to lease, rents or offers for rent the real estate of others; or who loans money for others or offers to negotiate a loan secured or to be secured by a deed of trust or mortgage on real property."

Multiple listing organizations serve a single, narrow purpose: They simply disseminate listing information for the licensed real estate brokers. These organizations perform none of the traditional acts of real estate brokers, such as advertising and showing listed property; completing real estate contracts and receiving earnest money deposits; and arranging for "closing" on real estate transactions. All of these functions are performed by the individual real estate brokers. The transacting parties do not pay any commissions to the multiple listing organizations; rather, these organizations collect any fees or charges directly from the brokers.

We are persuaded that multiple listing organizations do not hold themselves out to the public as real estate brokers nor do these organizations engage in the business of buying and selling the real estate of others.

It is our view that multiple listing organizations do not act as real estate brokers and thus are not required to be licensed as real estate brokers pursuant to Chapter 339, RSMo.

Yours very truly,

JOHN C. DANFORTH
Attorney General

LEVEES:
LEVEE DISTRICTS:
DRAINAGE DISTRICTS:

The St. John Levee and Drainage District, a circuit court drainage district of New Madrid and Mississippi Counties, Missouri,

has statutory authority to give assurances to the Department of Army as are required by the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

OPINION NO. 26

April 4, 1972

Honorable Frederick W. DeField
Representative, District 158
Room 401, Capitol Building
Jefferson City, Missouri 65101



Dear Representative DeField:

This is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

"Has the St. John Levee and Drainage District, a Circuit Court drainage district of New Madrid and Mississippi Counties, Missouri, a Public Corporation of the State of Missouri, the statutory authority to comply with the provisions of Public Law 91-646, 'Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1971, as required therein.

"From time to time the St. John Levee and Drainage District receives requests from the Department of the Army for right-of-way for levee enlargement or for new levee construction. This right-of-way is furnished at no cost to the Department. The Department constructs the levee enlargement or new levee at no cost to the district. The right-of-way is acquired by the District by easement, deed or by condemnation if required. At the present time, and at the request of the Department, the district is in the process of acquiring right-of-way for proposed levee enlargement. This right-of-way extends along the river front levee in both New Madrid and Mississippi Counties and is quite extensive, covering a distance of some 14 miles for a total of approximately 450 acres, all

Honorable Frederick W. DeField

acreage to be used as borrow pits. It is anticipated that it may take a period of not less than 12 months to accomplish this purpose. This district has been requested by the Department of the Army to assure said Department that it will make every effort to come within the provisions of Public Law 91-646 by July 1, 1972, if, as it appears, it is now without statutory authority so to do." (Emphasis added)

Public Law 91-646 which may be cited as the "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970," and hereinafter referred to as the Act, was legislation passed by Congress to provide for uniform and equitable treatment of persons displaced from their homes, businesses, or farms by federal and federally assisted programs and to establish uniform and equitable land acquisition policies for federal and federally assisted programs. See U.S. Code Congressional and Administrative News, Volume 2, Page 2222.

Title II of the Act refers to uniform relocation assistance. In general, the following categories of assistance are provided for: (1) moving expenses from homes, businesses and farm operations (Section 202); (2) replacement housing for homeowners (Section 203), and (3) replacement housing for tenants (Section 204). This assistance is required to be provided by any state agency receiving federal funds for any project resulting in displacement of any person after July 1, 1972 (Section 210). Such relocation assistance provided by the state agency is to be included along with other costs of the project and eligible to some extent and manner for federal funding of the project (Section 211).

Title III of the Act refers to uniform real property acquisition policy. In this regard, Section 305 of the Act provides that state agencies administering programs receiving federal financial assistance must be guided to the greatest extent practicable under state law, by the land acquisition policies set forth in Sections 301 and 302 of the Act, as a condition of such federal assistance. In addition, Section 305 of the Act provides that state agencies administering programs receiving federal financial assistance must provide for reimbursement of the owner for expenses incidental to transfer of title and for reasonable expenses of litigation.

The statutory authority for the organization of the St. John Levee and Drainage District, a circuit court drainage district of New Madrid and Mississippi Counties, Missouri, is found in Chapter 245, RSMo 1969. In general, Section 245.015, RSMo 1969, provides that the owners of a majority of the acreage in any contiguous body

Honorable Frederick W. DeField

of swamp, wet or overflowed land, or lands subject to overflow, wash or bank erosion, may form a levee district for the purpose of having such land and other property reclaimed and protected from the effects of overflow and other water, for sanitary or agricultural purposes, or from the effect of wash or bank erosion. Section 245.060, RSMo 1969, provides that the owners of real estate or other property situated in said district may elect a board of supervisors. The powers and duties of a board of supervisors are set forth in Section 245.095, RSMo 1969; and in general, the board has the power of condemnation in order to effect the leveeing, protection, and reclamation of the land and other property in the district subject to tax. Upon the adoption of the plan for reclamation, the board of supervisors may petition the circuit court to appoint commissioners to appraise the lands within and without said district to be acquired for rights-of-way, holding basins, and other works of the district, and to assess benefits and damages accruing to all lands in the district and other property by reason of the execution of the plan for reclamation. Section 245.150, RSMo 1969, further provides that the price awarded for all lands acquired by any district for rights-of-way or other works and the amount of damages assessed by the board of commissioners and confirmed by the court to any tract or parcel of land or other property in the district shall be paid in cash to the owner thereof or to the clerk of the court for the use of such owner. Finally, Section 245.150, RSMo, provides that the board of supervisors of said district shall have full power and authority to build, construct, excavate, and complete all or any work and improvements which may be needed to carry out, maintain, and protect the plan for reclamation. It is further provided under this section as follows:

" . . . that if and when the state of Missouri or the United States of America or any subdivision, department, division or agency thereof is willing to construct the works and improvements provided for in the plan for reclamation or any part thereof, the board of supervisors of said district is authorized to cooperate with such agency to the fullest extent and is hereby granted power and authority to accent any such work in aid of the project, irrespective of whether it be by way of grant of funds, labor, work, materials or otherwise and may, in the discretion of the board of supervisors, give such assurances as may be required to obtain the construction of the works and improvements provided for in the plan for reclamation."
(Emphasis added)

Under the above section, it was pointed out in In re Tarkio-Squaw Levee District of Holt County, 319 S.W.2d 660 (Mo. banc 1959)

Honorable Frederick W. DeField

that the board of supervisors of a levee district has power to enter into a contract with federal government authorities in relation to construction of levees in a levee district. Also, it was held in Opinion No. 30, Foote, February 24, 1948, that the St. John Levee and Drainage District had authority under what is now Section 246.170, RSMo 1969, to give assurances to the United States that it would maintain and operate certain levee and drainage works after their completion by the federal government (copy attached).

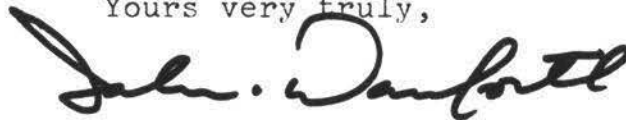
As a result of the above, it is our view that the St. John Levee and Drainage District, a circuit court drainage district of New Madrid and Mississippi Counties, Missouri, has statutory authority to give assurances to the Department of Army as are required by Sections 210 and 305 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

CONCLUSION

It is the opinion of this office that the St. John Levee and Drainage District, a circuit court drainage district of New Madrid and Mississippi Counties, Missouri, has statutory authority to give assurances to the Department of Army as are required by the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,



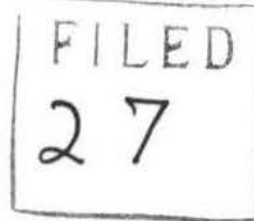
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 30
2-24-48, Foote

February 14, 1972

OPINION LETTER NO. 27
Answer by Letter - Klaffenbach

Honorable J. Anthony Dill
Missouri State Representative
8011 Grandvista Avenue
St. Louis, Missouri 63123



Dear Representative Dill:

This letter is in response to your opinion request in which you ask:

"Please provide your opinion on the legal effect of a school board and a superintendent entering into an overlapping contract in the following regards:

"1. Does the constitution render the entire new contract void or does it merely make it illegal for the school district to pay the increased rate of compensation over and above the compensation provided for in the prior contract?

"2. In a situation where a school district may have entered into a series of overlapping contracts for compensation of a superintendent, does the school district have the authority to recover a refund of any additional compensation paid to the superintendent in accordance with a subsequent overlapping contract and does the school district have a legal obligation to insist upon or sue for any additional compensation paid?"

First of all we wish to note that we do not have the precise facts of a particular case before us and therefore answer your questions in general.

Honorable J. Anthony Dill

You refer to our Opinion No. 171, dated May 4, 1971, to the Honorable Donald J. Gralike, copy enclosed, in which we held that the constitutional provisions therein cited prohibited such a school board and the superintendent from terminating a partially performed three-year contract and executing a new three-year contract providing for the performance of the same duties at a greater compensation when the only reason for so doing is to increase the superintendent's compensation before the expiration of the current contract.

In answer to your first question the new contract is void to the extent that it overlaps with the first contract, since an essential element of the contract, the consideration, is not lawful. We do not determine here whether in the particular case the contract is valid with respect to the period of time which it may by its terms extend beyond the term of the original contract.

In answer to your second question, in such a case, it must be recognized that school funds are held in trust, *Veal v. Chariton County Court*, 15 Mo. 412 (1852) and are not private funds, *State v. Powell*, 221 S.W.2d 508 (Mo. 1949). Likewise, it is well settled that unauthorized payments of public moneys by an official, particularly when made in direct violation of positive law, may be recovered, *Kansas City v. Halvorson*, 177 S.W.2d 495 (Mo. 1944), *State v. Powell*, *Id.* It follows in our view that it is axiomatic that such a trustee of public funds must take whatever legal action is required under the circumstances to protect, preserve and in this case, recover, such funds.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Opinion No. 171, 5/4/71, Gralike

PAROLE:
NARCOTICS:
CRIMINAL LAW:
CRIMINAL PROCEDURE:
CONTROLLED SUBSTANCE:

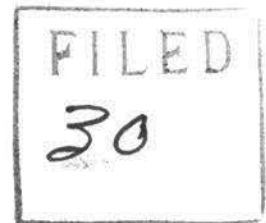
(1) Section 195.220, S.C.S.H.C.S.H.B. No. 69, 76th General Assembly (RSMo Supp. 1971, 195.221), as it concerns the granting of parole from a state correctional institution of anyone who is convicted of selling, giving,

or delivering a controlled substance as defined by newly enacted Chapter 195, affects only those persons sentenced pursuant to such chapter after the effective date of its passage. (2) Such section does not affect the administrative function of the Department of Corrections in reference to Section 216.355(1), RSMo. (3) An individual under supervision of the Board of Probation and Parole who was sentenced to the State Department of Corrections for selling, giving, or delivering a controlled substance pursuant to Chapter 195 is not to be given credit for parole time as time toward service of his sentence for application of the three-fourths rule, Section 216.355(1), RSMo 1969.

OPINION NO. 30

January 7, 1972

Mr. Walter G. Sartorius, Chairman
Board of Probation and Parole
P. O. Box 267
Jefferson City, Missouri 65101



Dear Mr. Sartorius:

This is in reply to your request for an opinion of this office concerning the applicability of the recently enacted Section 195.220, S.C.S.H.C.S.H.B. No. 69, 76th General Assembly (RSMo Supp. 1971, 195.221), to two questions you pose. Those questions are: (1) Do the provisions of Section 195.220 apply to individuals sentenced after the effective date of Chapter 195, or do the provisions of Section 195.220 apply to those convicts now incarcerated in the Missouri Department of Corrections and eligible for parole, or those on parole? (2) Your second question asks whether Section 195.220 affects the operation of Section 216.355(1), RSMo 1969, which section is referred to as the three-fourths law.

Our research leads us to conclude that: (1) Section 195.220, as it concerns the granting of parole from a state correctional institution of anyone who is convicted of selling, giving, or delivering a controlled substance as defined by Chapter 195, affects only those persons sentenced pursuant to newly enacted Chapter 195 after the effective date of its passage; (2) Section 195.220, does not affect the administrative function of the Department of Corrections in reference to Section 216.355(1).

Mr. Walter G. Sartorius

I

Consideration should be given to the newly enacted Section 195.220, said section reading:

"Notwithstanding Section 549.275 RSMo, if the board of probation and parole releases any person from a state penal institution who was convicted of selling, giving, or delivering a controlled substance as defined in this chapter, the period of parole shall be for not less than the completion of the original sentence plus five years. If, however, he is found to have violated the conditions of his parole, he shall be recommitted to confinement by the department of corrections for the remainder of the term set by the original sentence from which he was paroled." [emphasis added]

Our reading of Section 195.220 and a contemporaneous reading of the Controlled Substances Act compels the conclusion that the legislative intent was not that the parole provisions of Section 195.220 be applied retroactively. Quite clearly, as can be seen by the underlined portions of the set out section, only a person who is released on parole or probation from a state correctional institution who was convicted of selling, giving, or delivering a controlled substance under the newly enacted Chapter 195, is controlled by the provisions of Section 195.220. Thus, it is our conclusion that Section 195.220 applies only to those persons convicted of selling, giving, or delivering a controlled substance under the newly enacted Chapter 195 from and after the effective date of such newly enacted chapter.

II

Your second question concerns the application of Section 216.355(1), RSMo, the three-fourths rule. We note, the Board of Probation and Parole is without administrative discretion involving the application of Section 216.355(1), as exclusive authority resides with the Department of Corrections. In Ex parte Rody (Mo.Sup. en banc 1941) 152 S.W.2d 657, the court stated, in reference to the three-fourths law:

". . . the conditions of the three-fourths rule enacted by Sec. 9086, supra [now Section 216.355], must be read into every judgment of conviction. They offer a reward in the form of diminished incarceration to every convict for obedience to the rules of the prison and laws of the same.

Mr. Walter G. Sartorius

"But the enforcement of these rules and laws, so far as they affect the reward, is administrative, not judicial. Sec. 9086, itself, required breaches thereof to be recorded on the prison records. Sec. 8985, *supra*, requires the Commission of the Department of Penal Institutions to make and enforce such by-laws, rules and regulations as they deem necessary. . . ." [loc. cit. 660; emphasis the Court's]

Clearly, from the court's discussion in Rody, and in Ex parte Carney (Mo.Sup. en banc 1938) 122 S.W.2d 888 and Ex parte England (Mo.Sup. en banc 1938) 122 S.W.2d 890, the application of Section 216.355, RSMo, is an exercise of administrative decision to be made by the Department of Corrections of the State of Missouri after review of a convict's conduct record while confined in the Department of Corrections. As the court indicates in Rody, an inmate does not automatically upon being confined to the Department of Corrections receive the benefits of the three-fourths rule. See Opinion of the Attorney General No. 37, Hamilton, 12-19-55 [copy enclosed].

The court discussed the purposes of the three-fourths rule in Hunter v. Hunter (Mo.Sup. Div. 1, 1951) 237 S.W.2d 100 where the court states:

"The three-fourths rule itself is based upon, and its application arises out of, the prisoner's conduct after confinement under and in execution of a sentence. While application of the rule may result in reduction in the sentence, neither the rule's existence nor its application changes the original sentence under which the convict was confined. . . ." [loc. cit. 103; emphasis the Court's]

It is our conclusion that Section 216.355(1), *supra*, is not affected by Section 195.220. It should be noted that in a prior opinion request dealing with Section 195.220, Opinion No. 388, Sartorius, 11-8-71, this office has ruled that Section 195.220 operates so that an individual under supervision of the Board of Probation and Parole who was sentenced to the State Department of Corrections for selling, giving, or delivering a controlled substance is not to be given credit for parole time as time for his service of his term of imprisonment pursuant to Section 549.275(1), RSMo; and on the basis of our discussion therein, we conclude that an individual under supervision of the Board of Probation and Parole who was sentenced to the State Department of Corrections for selling, giving, or delivering a controlled substance pursuant to Chapter

Mr. Walter G. Sartorius

195 is not to be given credit for parole time as time toward service of his sentence for application of the three-fourths rule, Section 216.355(1). In essence the granting of the statutory grace time of Section 216.355(1) resides in the Department of Corrections with the appropriate controlling legal criteria, and Section 216.355(1) is not applicable to a person paroled or on probation pursuant to Section 195.220. In this regard, we have considered Opinion of the Attorney General No. 60, Means, 9-26-57 [copy enclosed] which held that time served on parole counted toward time on service of sentence for purposes of the three-fourths law and hold this opinion inapplicable to an individual under supervision of the Board of Probation and Parole pursuant to Section 195.220 who was sentenced to the State Department of Corrections for selling, giving, or delivering a controlled substance. See Opinion of the Attorney General No. 388, Sartorius, 11-8-71.

CONCLUSION

It is, therefore, the opinion of this office that:


(1) Section 195.220, S.C.S.H.C.S.H.B. No. 69, 76th General Assembly (RSMo Supp. 1971, 195.221), as it concerns the granting of parole from a state correctional institution of anyone who is convicted of selling, giving, or delivering a controlled substance as defined by newly enacted Chapter 195, affects only those persons sentenced pursuant to such chapter after the effective date of its passage.

(2) Such section does not affect the administrative function of the Department of Corrections in reference to Section 216.355(1), RSMo.

(3) An individual under supervision of the Board of Probation and Parole who was sentenced to the State Department of Corrections for selling, giving, or delivering a controlled substance pursuant to Chapter 195 is not to be given credit for parole time as time toward service of his sentence for application of the three-fourths rule, Section 216.355(1), RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Kenneth M. Romines.

Yours very truly,


JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 37
12-19-55, Hamilton

Op. No. 60
9-26-57, Means

May 9, 1972

OPINION LETTER NO. 31
Answer by Letter - Burns

Honorable Joe A. Johnson
Prosecuting Attorney
Jefferson County
Post Office Box 246
Hillsboro, Missouri 63050



Dear Mr. Johnson:

This is in answer to your inquiry asking whether a county treasurer would violate Section 561.460, RSMo, if he issues checks for the distribution of school funds to school districts when the check he has received from the state out of which the school districts are to be paid has not been credited to the treasurer's account by the depository bank. It is our understanding that the county depository involved does not credit the proceeds of a check for a period of four days unless it is notified in a shorter period that the check has cleared.

It is our view that the provisions of Section 561.460 are not violated by the treasurer's issuing such checks. We believe it to be clear that there is no intent to defraud when the officials of the school district have been informed of the fact that at the time checks are written for payment of funds to such school districts the proceeds of the state check have not been credited to the treasurer's account but will be credited to his account only on the expiration of four days after such deposit or when the bank is informed of the clearance of such state check in less than four days.

In the case of State v. Phillips, 430 S.W.2d 635, the St. Louis Court of Appeals specifically ruled on this point, stating l.c. 636, 637:

Honorable Joe A. Johnson

"As defendant contended when he moved for acquittal, the State's evidence showed that when Phillips gave Rotskoff the check Phillips did not represent it to be good. Phillips' only representation was that the check would be good later--not a representation of an existing fact but of a future condition. That did not show the required intent to defraud. We reach this conclusion on the general principles of fraud law in Missouri and the specific application of the principle by other courts."

Since the school district officials are aware that there is no representation being made except as to future payment the requisite intent would be lacking and there is no violation of the statute.

The advisability of the treasurer's issuing checks when he is aware that there are no funds in his account at the time he issues such checks is not passed upon in this letter since we pass only on the question of whether or not the treasurer would be guilty of a violation of a criminal law if he did so.

Very truly yours,

JOHN C. DANFORTH
Attorney General

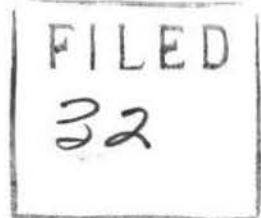
ELECTIONS:
POLLING PLACE:
CRIMINAL LAW:
CORRUPT PRACTICES:

The boundaries of a "polling place" are determined by the perimeter of the area actually occupied by the election personnel, supplies, and equipment of the place at which the voters cast their ballots. Where a room is fully occupied, the walls of the room define this perimeter. Where less than the total area of an enclosure is occupied, the perimeter of the area actually occupied defines the boundaries.

OPINION NO. 32

February 1, 1972

Honorable Wayne Groner
Representative, District 145
Room 235B, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Groner:

This opinion has been prepared in response to your recent request. The question you presented in that request was:

"Please define the boundaries of a polling place as used in Section 129.840 Rsmo. Is a polling place the booth in which voting takes place, the room in which the booth is located, the building in which the room is located or the land on which the building sits?"

The relevant portion of Section 129.840, RSMo 1969, states:

". . . No person whatever shall do any electioneering on election day within any polling place, or within one hundred feet of any polling place. . . ."

The context of that sentence, as well as the context of the sentences which surround it, indicates that the term "polling place" as used in this section would be that place to which qualified voters must come to cast their ballots. There does not appear to be any definition of the term "polling place" in Chapter 129, RSMo 1969, or in any of the other sections of the Revised Statutes. In State ex rel. Fahrman v. Ross, 160 Mo.App. 682, 143 S.W. 502 (Spr. Ct.App. 1912), a mandamus action against judges of a county court to compel them to issue a license to keep a dram shop, the validity of an election was in issue. In determining the issue, the court contrasted the term "polling place" with the term "place of election." In explaining the difference between these terms, the court

Honorable Wayne Groner

indicated that the term "polling place" referred to that place where voters come to cast their ballots. At 29 C.J.S 28, Elections, 1(10), the word "polls" is defined by the following:

"The word 'polls' has a meaning which is well-defined and understood, and signifies the place to which voters go to cast their ballots."

Therefore, it can be inferred that the term "polling place" would also signify the place to which voters go to cast their ballots.

The result of this basic research, then, indicates that the term "polling place" is used to identify a location in which the characteristic activity occurs. The term "polling place" does not, however, imply characteristic physical boundaries which can be found at every location. In other words, a "polling place" is identified by the character of the activities occurring there and not by the type of enclosure or physical boundary surrounding it. Nevertheless, if the purpose of Section 129.840, RSMo 1969, is to be accomplished, boundaries must be found from which a uniform one hundred foot non-electioneering zone can be measured.

It is clear that Section 129.840, RSMo 1969, affects Missouri citizens' rights to solicit votes and distribute literature, which are both rights protected by the First Amendment to the United States Constitution. Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966); Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946). The language of Section 129.840, RSMo 1969, taken as a whole, indicates that the purpose of this section is to protect voters from annoyance or possible surveillance during the time they are casting their ballots. This would appear to be a substantial governmental interest which would justify the incidental restriction of First Amendment freedoms. The legislature in seeking to enact a statute which would meet the current federal constitutional standards, must have intended to impose only incidental restrictions on First Amendment freedoms which would be no greater than essential to accomplish this substantial state interest. U. S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965). Thus, the legislature must have intended to create a non-electioneering zone no larger than necessary to isolate individuals in the process of voting from the annoyance and surveillance of electioneers. In addition, because Section 129.840, RSMo 1969, defines a misdemeanor, it should be strictly construed in favor of possible defendants. State v. Katz Drug Company, 352 S.W.2d 678 (Mo. banc 1961).

The uniform boundaries which the legislature intended to establish, then, must be the perimeter of the area actually occupied by those items and pieces of equipment necessary for the voters to cast

Honorable Wayne Groner

their ballots. These would include the poll books, voting machines or ballots boxes, the voting booths, the places where notices of election are displayed, and the chairs, tables and other equipment used by the election judges and clerks. Where one room is fully occupied by these items and pieces of equipment, the boundaries would be the walls of the room. Where a gymnasium or larger enclosure has been designated as a polling place, and only a portion of the area within the designated enclosure is actually used, the boundary should be the perimeter of the area actually occupied by the items and equipment. In this case, at least part of the perimeter would be an imaginary line, or a line drawn by election officials, which circumscribes the area actually occupied by the items and equipment of the "polling place." These boundaries are sufficient to accomplish the substantial state interest, while providing the least possible infringement on the interests of citizens exercising their First Amendment rights and possible defendants charged with a violation of the statute.

CONCLUSION

For the purposes of construing Section 129.840, RSMo 1969, prohibiting electioneering within one hundred feet of any polling place, it is the opinion of this office that the boundaries of a "polling place" are determined by the perimeter of the area actually occupied by the election personnel, supplies, and equipment of the place at which the voters cast their ballots. Where a room is fully occupied, the walls of the room define this perimeter. Where less than the total area of an enclosure is occupied, the perimeter of the area actually occupied defines the boundaries.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Stephen D. Hoyne.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large, stylized initial "J".

JOHN C. DANFORTH
Attorney General

PLANNING COMMISSION:
COOPERATIVE AGREEMENTS:

A regional planning commission organized under the provisions of Sections 251.150, RSMo 1969 et seq.,

is advisory to the governmental units in the region and does not have authority to exercise the legislative functions of local government although the participating municipalities may, under Sections 89.010, RSMo 1969 et seq., adopt planning and zoning as recommended by the commission. Such a regional planning commission has no authority to enter into an agreement with municipalities to enforce municipal codes.

OPINION NO. 33

February 29, 1972

Honorable Frederick W. DeField
Representative, District 158
Room 401, Capitol Building
Jefferson City, Missouri 65101



Dear Representative DeField:

This opinion is in response to your question in which you ask:

"Would an employee of a regional organization, such as the Bootheel Regional Planning Commission, be in contravention of any State law in entering individual communities of which he is not a resident or official for the purpose of enforcing a regional building code sponsored under a Department of Housing and Urban Development Program, where the Cities involved had elected to participate in such a regional building code program?

"Can a City of the 3rd or 4th class take action to participate in a regional program that would establish regional building codes to be effective in the individual communities, where the individual cities would delegate the establishment of particular code provisions and the enforcement of the building code to a regional organization?

"If such a city cannot delegate the establishment of particular code provisions, could the city after properly establishing the code delegate the inspection and enforcement function to a regional organization?"

Honorable Frederick W. DeField

You also state that:

"The Bootheel Regional Planning Commission is in the process of trying to establish a Regional Code Enforcement Program. This is a Department of Housing and Urban Development Program and makes certain monies available to communities based upon meeting the federal requirements of the Program. The program is not available to individual communities that have a certified workable program and a comprehensive plan. The new proposal is to accomplish and administer this program on a regional basis. The Department of Housing and Urban Development is receptive to this plan which is presently being pursued in two other states (Texas and Pennsylvania.) The Bootheel Regional Planning Commission located in Malden, Missouri would be the sponsoring agency to administer the program. The actual functioning of the program would involve situations where an employee of the Bootheel Regional Planning Commission would enter individual communities to enforce the code, and would have to have the authority and power to halt construction not in compliance with the Code."

It is our understanding that the Bootheel Regional Planning Commission is created pursuant to the provisions of Sections 251.150, RSMo 1969 et seq. Under such sections it has the authority to appoint employees, Section 251.280, advisory groups or councils, Section 251.290 and functions as an advisory regional planning commission with respect to the local governmental units in the region, Section 251.300, involving a multitude of regional planning projects, Section 251.180. See also 1st Annual Report Bootheel Regional Planning Commission, June 1971.

The first question that we take under consideration is whether the particular municipalities involved can delegate the establishment of regional building codes to be effective in the individual municipalities. Under the provisions of Chapter 89, RSMo 1969, cities, towns and villages are empowered to plan and zone, Section 89.020, and to establish planning commissions, Sections 89.300, RSMo 1969 et seq.

Further, under Sections 70.210, RSMo 1969 et seq., political subdivisions such as cities, towns and villages have the authority to enter into cooperative agreements and cooperative action for planning and for common services, Section 70.220. Joint contracts thus entered into may provide for the establishment and selection

Honorable Frederick W. DeField

of joint boards, commissions or officers to supervise, manage and have charge of such joint planning or service, Section 70.260, and, the governing body of a municipality or political subdivision has the power to abolish the office of the facility taken over by any other municipality or political subdivision and to transfer such powers to the officer who is to perform them under the terms of the contract or cooperative action, Section 70.280.

However, legislative functions cannot be delegated. State ex rel. Ludlow v. Guffey, 306 S.W.2d 552 (Mo. 1957). And, this office has held in Opinion No. 213 dated May 15, 1963 to the Honorable E. J. Cantrell that neither the cooperative agreement sections of the Missouri Constitution, Article VI, Section 16 nor the cooperative agreement statutes authorize the delegation of sovereign functions. In that respect, that opinion, which we enclose, states in part:

" . . . Even more fundamental and elementary than the separation of powers provision of the Constitution is a foundation principle of government that executive, legislative and judicial powers which relate to the exercise of sovereignty are generally considered nondelegable duties. It would seem unlikely that the draftsmen of the Constitution intended to authorize one political subdivision to delegate to another the authority to exercise its strictly sovereign functions. For example, one county court could not by contract authorize the county court of another county or city counsel of a municipality to perform its strictly executive or legislative functions. . . ."

Thus, in answer to your first question, the Bootheel Regional Planning Commission has only an advisory function with respect to the local governmental units in the region except as provided in subsection 3 of Section 251.360 and does not have and cannot be given the authority to establish code provisions for the communities involved. Code provisions can be suggested, but if they are to be validly adopted, they must be adopted by the municipalities involved.

With respect to your second question relating to the delegation of the inspection and enforcement functions of code provisions that have been adopted by such municipalities, we have noted that the function of a regional planning commission under Sections 251.300, et seq., is solely advisory to the local governments and local government officials comprising the region. While Sections 70.210, et seq., authorize political subdivisions as defined therein to

Honorable Frederick W. DeField

contract or cooperate with each other for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, the subject and purposes of any such contract or cooperative action must be within the scope of the powers of such political subdivisions, Section 70.220. We conclude, without reaching the question of whether a regional planning commission is a "political subdivision" as defined in such sections, that, since a regional planning commission has no power of enforcement in its own right, it cannot enter into agreements with cities to perform such services. In this respect, see also Section 251.380, RSMo Supp. 1971, which authorizes certain contracts or cooperative action in "matters relating to comprehensive planning."

CONCLUSION

It is, therefore, the opinion of this office that a regional planning commission organized under the provisions of Sections 251.150, RSMo 1969 et seq., is advisory to the governmental units in the region and does not have authority to exercise the legislative functions of local government although the participating municipalities may, under Sections 89.010, RSMo 1969 et seq., adopt planning and zoning as recommended by the commission. Such a regional planning commission has no authority to enter into an agreement with municipalities to enforce municipal codes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



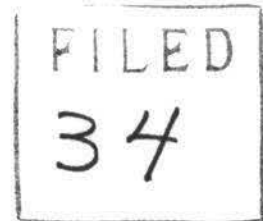
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 213
5-15-63, Cantrell

February 14, 1972

OPINION LETTER NO. 34
Answer by Letter - Klaffenbach

Honorable William S. Brandom
Prosecuting Attorney
Clay County, Courthouse
Liberty, Missouri 64068



Dear Mr. Brandom:

This letter is in response to your opinion request in which you ask the following questions:

- "1. Whether the Circuit Court of Clay County, Missouri, through its budget request can require the County Court to purchase and remodel a specific building for juvenile detention and juvenile office facilities.
- "2. Whether the Circuit Court can purchase and remodel a specific building for juvenile offices and juvenile detention facilities and require, by budget request, the County Court to provide the monies necessary for the purchase.
- "3. Whether the County Court or the Circuit Court makes the determination under the case of State ex rel Weinstein vs. St. Louis County as to the appropriateness of the quarters provided to the Circuit Court for juvenile offices and detention facilities.
- "4. Is the availability of funds for providing services to other county departments a factor that must be considered in making that decision?"

Honorable William S. Brandom

You also state that:

"Clay County juveniles in detention are kept in the County Jail, which has become extremely crowded. Clay County Juvenile Officers are housed in the Court House and do not contain sufficient space for all deputies to have a desk, leading to several deputies being stationed in Jury Rooms, Judge's offices and even in one of the Court Rooms. The Juvenile Court holds its sessions in a Jury Room. The Circuit Court has proposed to include in its budget for 1972 funds for the purchase of a building, now available, about a block and a half from the Court House, and funds for remodeling the building for detention facilities and office space which would be adequate for the Juvenile Office. The County Court is exploring other alternatives for space but has made no concrete proposals. Tax funds available to Clay County for this year are severely limited as a result of the constitutional ceiling of a 35-cent levy which was in effect for 1971. The County Court expects to be required to cut the budgets of other county offices sharply if it is required to provide the requested funds to the Circuit Court for a building."

Our answer to your first two questions is that the circuit court does not have the power to purchase such real property or to order the county court to purchase particular property for the reason that Section 211.331, RSMo 1969 provides that the county court has the duty to provide such juvenile detention facilities and offices for the personnel of the juvenile court.

The answer to your third question is more difficult. As we noted it is the duty of the county court to provide such facilities. However, there is nothing to deter the circuit court from making a determination that existing facilities are so inadequate that justice cannot function. The inherent power of the circuit court in this respect is noted in State ex rel. Weinstein v. St. Louis County, 451 S.W.2d 99 (Mo. 1970) and cases cited therein at l.c. 101. However "such inherent power in the judicial department should be exercised only on occasions where necessary personnel and facilities are not provided by conventional methods." Id. 102. The dissenting opinion of Judge Finch in the later case of State v. Green, 470 S.W.2d 571 (Mo. 1971) restates the principles involved. We cannot say whether such a determination would be proper in the premises or that any action taken by the circuit court would be

Honorable William S. Brandom

sustained by the Supreme Court on review. Notably the one element of the Weinstein case, the interpretation of the county budget, Section 50.640, RSMo 1969, would not appear to have any bearing in this instance since the circuit court's budget, in our view, could not include money for the purchase of real property for court space or juvenile space as the county court has been given the power to make such purchases. Section 211.331 and Sections 49.305, RSMo 1969 et seq. Changes can be made in the budget submitted by the circuit court or the circuit clerk where there is no authority in law for such expenditures. State ex rel. Weinstein v. St. Louis County, 421 S.W.2d 249, 253 (Mo. 1967).

We wish to add and to make it clear that it is our view that the determination of the question of whether the factual situation justifies the circuit court in acting under the principles enunciated in the cited cases involves a pending question for judicial determination. As such a question is a pending judicial question, we do not believe that we should attempt to resolve it by an opinion of this office.

In answer to your fourth question, it appears obvious to us that the money available to the county must be considered and that the circuit court cannot compel the county court to spend a disproportionate amount of county funds on the circuit court.

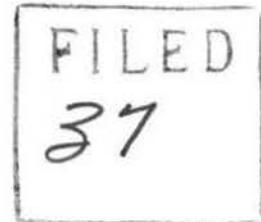
Very truly yours,

JOHN C. DANFORTH
Attorney General

February 25, 1972

OPINION LETTER NO. 37
Answer by Letter - Klaffenbach

Mr. John C. Vaughn
Comptroller and Budget Director
State of Missouri
Post Office Box 809
Jefferson City, Missouri 65101



Dear Mr. Vaughn:

This letter is in response to your opinion request in which you ask whether a member of a county board of education could be reimbursed by the state for the purchase of office equipment such as file cabinets, typewriters and the like, under the provisions of Section 162.151, RSMo 1969.

You state that:

"A member of the Grundy County Board of Education purchased a file cabinet and requested this office to make reimbursement for same.

"Previous to this request this office made reimbursement only for meals and mileage to members of County Boards of Education.

"Section 2.150 of House Bill 2 of the 76th General Assembly appropriated \$2,500.00 as expenses for County Board of Education, which this office does not feel indicates they intended to pay for office equipment."

Section 162.151, RSMo 1969 to which you refer provides:

"Each member of the board shall be reimbursed for the actual expense incurred in the performance of his duties as a member of the

Mr. John C. Vaughn

board. All expenses shall be itemized and approved by the president of the board and certified by the secretary to the state comptroller. The reimbursement shall be paid from the state school moneys fund"

While we find no Missouri cases interpreting this section we take note of the fact that your office has given this section an administrative interpretation consistent with your views as expressed above and that, as you have noted, the legislature has appropriated a nominal amount for such expenses. Under these circumstances and in view of the strict construction always given to statutes dealing with officers' allowances or compensation, we conclude that the expenses encompassed by Section 162.151 are limited to strictly personal expenses and do not extend to office supplies or equipment.

Very truly yours,

JOHN C. DANFORTH
Attorney General

PENSIONS:
RETIREMENT:
PUBLIC RECORDS:
STATE EMPLOYEES:
STATE EMPLOYEES'
RETIREMENT SYSTEM:

An individual who is not a member of the Missouri State Employees' Retirement System may inspect the records of the proceedings of the board of trustees of the system under the provisions of Section 104.480, RSMo 1969, for the purpose of determining how many members over the age of seventy years are employed by the state.

OPINION NO. 38

March 22, 1972

Mr. Edwin M. Bode
Executive Secretary
Missouri State Employees'
Retirement System
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Bode:

This is to acknowledge receipt of your request for an opinion from this office which reads as follows:

"Advice is requested as to whether an individual who is not a member, may inspect the records of the Missouri State Employees' Retirement System for the purpose of determining how many members are employed by the State over the age of seventy years."

Section 109.180, RSMo 1969, reads as follows:

"Except as otherwise provided by law, all state, county or municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen. Any official who violates the provisions of this section shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars, or by confinement in the county jail not exceeding ninety days, or by both the fine and the confinement."

Mr. Edwin M. Bode

The above section declares all records of the state, county and municipalities kept pursuant to statute or ordinance, to be "public records" except where otherwise provided by law.

In connection with the above, it is our understanding that the board of trustees keeps a record of all proceedings of the board affecting the retirement system which is open to inspection by any member, in accordance with the provisions of Section 104.480, RSMo 1969. Subsection 1 of Section 104.480, supra, provides as follows:

"1. The board shall keep a complete record of all its proceedings, which shall be open at all reasonable hours to the inspection of any member."

In addition, Section 104.380, RSMo 1969, provides in part as follows:

"1. Each member shall retire at the end of the month during which such member shall reach normal retirement age with a normal annuity, except that

* * *

(2) Any person in any age category with professional, scientific or technical skills, who is so certified to the board of trustees by his department head, and such certification is approved by the board, shall not be precluded employment or continued employment; . . ."

It is further our understanding that all certifications by the respective departments are passed on in meetings by the board of trustees. In this regard, it is our belief that Section 104.480, supra, which provides that the records of the board shall be open to inspection by any member, does not limit inspection by the general public. There is much authority to support the proposition that in interpreting statutes providing for inspection of records such statutes should be liberally interpreted so as to provide for inspection except where expressly restricted or prohibited. State ex rel. Eggers v. Brown, 134 S.W.2d 28 (Mo. banc 1939). It is our view that there is no prohibition contained in Section 104.480, supra, against public inspection, but that the provisions providing for inspection by a member are simply additional provisions to make certain that there is no question about the right of any member to inspect the record of the proceedings of the board of trustees of the Missouri State Employees' Retirement System.

January 11, 1972

OPINION LETTER NO. 39
Answer by Letter - Klaffenbach

Honorable Robert S. Wiley
Prosecuting Attorney
Stone County
Galena, Missouri 65656



Dear Mr. Wiley:

This letter is in response to your request for an opinion in which you ask the following question:

"[W]here the Gate of the Temple, a Masonic Association, a Corporation, owns real estate located in Stone County, Missouri, small tracts of which are used by the members of the Association, their families and guests, for recreational purposes, is the real property exempt from taxation for county purposes under R.S. Mo. 137.100?"

You further state that:

"On October 19, 1949, B. F. Rice conveyed to Gate of the Temple, a Masonic Association, a Corporation, the Southwest Quarter of the Northwest Quarter of Section 25, Township 22, Range 23, Stone County, Missouri. The abstractor's copy of the warranty deed is attached hereto. The conveyance was executed upon certain conditions, including the following: that the property 'be used solely by the grantee, its members, their families and guests. . . ."

Honorable Robert S. Wiley

"The property is not used by the Association for worship or meeting purposes. Several cabins have been erected on the property, and the cabins are available to lodge members for recreational purposes. Each lodge member so using the real property 'donates' \$50.00 to the Association for the use thereof."

It is also our understanding that the Gate of the Temple, a Masonic Association, is a pro forma decree corporation incorporated by the order of the Circuit Court of Greene County. A copy of the decree is attached hereto.

First we note that the facts that you have furnished to us as noted above are rather meager and thus there is some difficulty in answering your question. Each tax exemption case is of course separate and distinct and must be decided upon its own particular facts. Paraclete Manor of Kansas City v. State Tax Commission, 447 S.W.2d 311 (Mo. 1969).

However the correct rules to be applied can be found in Fitterer v. Crawford, 57 S.W. 532 (Mo. 1900). In that case the Court noted that as a rule all property is liable to taxation and exemption is the exception, and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt. Id. 533. However the fact that the property in this case is used by only members and their guests does not necessarily make the use a non-charitable use. There is a material difference between what is denominated as a public charity and what is for purposes purely charitable. Id. 534-535. A too restrictive definition of charitable purposes should not be applied. YMCA v. Sestric, 242 S.W.2d 497, 503 (Mo. 1951).

Your question indicates that the so-called donation of \$50.00 for an undetermined period of use is in fact a rental. However it is our view that whether such payment is or is not a true donation does not in itself control in these circumstances since the primary question is whether, under Section 137.100, RSMo 1969, the use is charitable. In this respect your attention is called to the opinions of the Missouri Supreme Court relating to the use of land such as YMCA v. Sestric, *supra*; Midwest Bible & Missionary Institute v. Sestric, 260 S.W.2d 25 (Mo. 1953), and St. Louis Gospel Center v. Prose, 280 S.W.2d 827 (Mo. 1955). See also, In re Burroughs' Estate, 206 S.W.2d 340 (Mo. 1947) where the Court at l.c. 344 distinguished organizations having the primary purpose of social benefit to its members.

Honorable Robert S. Wiley

In the premises we not able to say that the property is or is not actually and regularly used for purposes purely charitable or is or is not actually occupied for the purpose of the organization.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure

COUNTY CLERKS:
COMPENSATION:
CONSTITUTIONAL LAW:

Section 51.310, House Bill No. 484
of the 76th General Assembly, effective
September 28, 1971, relative
to compensation for certain county

clerks for duties performed by them under Section 51.121, RSMo 1969,
relating to a survey of voters, provides for an increase in compensation
during the term of such officers in violation of Section 13
of Article VII of the Missouri Constitution and is not effective
during such officers' terms.

OPINION NO. 41

February 2, 1972

Honorable A. J. Seier
Prosecuting Attorney
Cape Girardeau County
225 North Clark Avenue
Cape Girardeau, Missouri 63701



Dear Mr. Seier:

This opinion is in response to your question which asks:

"Is a County Clerk of a Second-Class County
entitled to the compensation of One Thousand
Five Hundred Dollars (\$1,500.00) as specified
in RSMo. 51.310 for the performance of duties
imposed by Section 51.121; said duties being
performed during the year 1971 and having been
completed before May 10 of same year?"

Section 51.121, RSMo 1969, which was derived from C.C.S.H.S.
S.B. No. 13 of the 75th General Assembly states:

"In counties of the second, third, and fourth
classes, which have adopted the provisions of
chapters 114 and 116, RSMo, the county clerk
shall annually, on or before May tenth, inspect
all voting precincts in the county, review the
described boundary lines, and survey the number
of voters in each precinct measured by the
vote at the last preceding presidential election,
and within thirty days after the conclusion of
such inspection, present a signed report to the
county court and the county chairman of the two
political parties receiving the

Honorable A. J. Seier

largest number of votes in the last presidential election, detailing changes, alterations, and additions which appear to be necessary for the convenience of the voters."

The same act provided that for the additional duties imposed by the above section the county clerk was to receive in addition to the compensation provided by law the sum of \$1,500.00 per year. A third related section also provided that the county clerk was to be reimbursed for his reasonable and necessary travel expenses expended in the performance within the county of the duties imposed by that section in an amount to be determined by the county court not to exceed ten cents per mile traveled.

We therefore concluded on pages 7-8 of our Opinion No. 409, 1969 that:

"It should be emphasized that the first part of Paragraph 1 of Section 1 states that the county clerk 'shall annually, on or before May 10th,' perform such services. 'Annually' means '1. Reckoned by the term of a year . . . 2. Occurring once each year.' Webster's New International Dictionary, Second Edition (1950), p. 108.

"Inasmuch as the duties contemplated by Section 1 must be performed before May 10th but also must be performed annually, it is our view that Section 1 of the bill does not contemplate that any such duties will be performed during the year 1969; and as a consequence, no compensation can be paid during 1969 as the payment of such compensation during 1969 would constitute an increase of the compensation of the officer during his term without an additional increase in duties. We note also that Section C of page 6 of the bill provides that the provisions of Subsections 2 and 3 of Section 1 shall terminate December 31, 1970. The county clerk in counties of the second, third or fourth classes who perform the services set out under Section 1 of the bill will receive the additional compensation for such work in 1970, but not in 1969, and not in 1971 or thereafter.

"The payment of additional compensation for additional services is not in violation of Section 13, Article VII of the Constitution of

Honorable A. J. Seier

Missouri which prohibits an increase in compensation of officers. Mooney vs. County of St. Louis, 286 S.W.2d 763 (1956)."

As we indicated above, the 1969 legislation itself provided that the section authorizing compensation for the additional duties to be performed by the clerk would terminate and would not be effective after December 31, 1970. We believe that it is also important to note that C.C.S.H.S.S.B. No. 13 of the 75th General Assembly provided a comprehensive formula for the computation of salaries of clerks of each county of the second, third and fourth class effective January 1, 1971. Thus, there is no doubt that the legislature intended that the salary schedule as therein provided would be compensation for the duties of such clerks including duties imposed by Section 51.121.

Section 51.310, enacted by the 76th General Assembly, House Bill No. 484, effective September 28, 1971, provides:

"For the performance of the duties imposed by section 51.121 the county clerk shall receive, in addition to all other compensation provided by law, fifteen hundred dollars per annum, except that such additional compensation shall be limited to five hundred dollars in such counties as are described in section 51.295."

You have also advised us that the county clerk of the second class county to which you refer completed the duties imposed upon him by Section 51.121 before May 10, 1971. Also as you have indicated such duties were completed prior to the effective date of Section 51.310. It appears clear that Section 51.121 imposed duties upon such clerk for which he could receive no additional reimbursement for the year 1971. This is true for two reasons.

First of all, Section 39(3) of Article III of the Missouri Constitution prohibits the granting of extra compensation to public employees, including such county employees, after services have been rendered. A legislative grant of this nature after the performance of such services would in our view be in violation of that provision of the Constitution.

In addition, although the compensation provided for the performance of such duties at the time the duties were imposed in 1969 did not constitute a violation of Section 13 of Article VII of the Missouri Constitution with respect to an increase in an officer's compensation during his term as we noted in our previous opinion with respect to the year 1970, nevertheless, the legislature expressly provided that such provision for additional compensation terminated December 31, 1970. Thereafter, since the duties imposed

Honorable A. J. Seier

by Section 51.121 merged with the general duties of the office for which the clerk received other compensation it is our view that present Section 51.310 has the effect of allowing additional compensation for services which the clerk is already required to perform. Although the amount of the compensation is obviously identical to that previously provided for such clerks (except as noted in Section 51.310) inasmuch as the legislation enacted in 1969 automatically terminated such additional compensation as of December 31, 1970, the increase effective September 28, 1971 in our view constitutes additional compensation during such officer's term in violation of Section 13, Article VII of the Missouri Constitution.

CONCLUSION

It is the opinion of this office that Section 51.310, House Bill No. 484 of the 76th General Assembly, effective September 28, 1971, relative to compensation for certain county clerks for duties performed by them under Section 51.121, RSMo 1969, relating to a survey of voters, provides for an increase in compensation during the term of such officers in violation of Section 13 of Article VII of the Missouri Constitution and is not effective during such officers' terms.

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

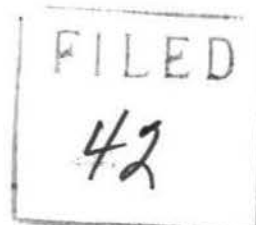
A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

May 12, 1972

OPINION LETTER NO. 42
Answer by letter-Jones

Mr. G. L. Donahoe, Executive Secretary
The Public School Retirement
System of Missouri
Post Office Box 268
Jefferson City, Missouri 65101



Dear Mr. Donahoe:

This letter is to acknowledge receipt of your request for an opinion from this office which reads in part as follows:

"Does the Board of Trustees of The Public School Retirement System of Missouri have the authority, or power, to adopt regulations which will permit the retirement system to receive contributions for a member who is on leave of absence from his teaching position, with compensation from the employer for the period spent on leave; and is the system authorized to allow membership service credit for the time spent on leave for which contributions are remitted by the employer?"

Subsection 1 of Section 169.050, RSMo 1969, defines members of the system as follows:

". . . all employees as herein defined of districts included in the retirement system thereby created shall be members of the system by virtue of their employment."

Subsection 6 of Section 169.010, RSMo 1969, defines "employee" as being synonymous with the term "teacher." The word "teacher"

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is defined in part in subsection 16 of Section 169.010, RSMo, as follows:

"'Teacher' shall mean any teacher, teacher-secretary, substitute teacher, supervisor, principal, supervising principal, superintendent or assistant superintendent, school nurse, or librarian who shall teach or be employed by any public school, state college or state teachers' college on a full-time basis and who shall be duly certificated under the law governing the certification of teachers; . . ."

In addition, the word "employer" is defined in subsection 7 of Section 169.010, RSMo, as follows:

"'Employer' shall mean the district that makes payment directly to the teacher or employee for his services;"

Subsection 1 of Section 169.030, RSMo 1969, indicates that contributions shall be made in equal amounts by "members of the system and their employers." Subsection 10 of Section 169.020, RSMo 1969, defines "membership service" as service rendered by a member of the retirement system after the service becomes operative. Finally, the board is granted authority to adopt rules and regulations by subsection 14 of Section 169.020, RSMo, which provides:

"Subject to the limitations of sections 169.010 to 169.130, the board of trustees shall formulate and adopt rules and regulations for the government of its own proceedings and for the administration of the retirement system."

As is indicated, the power of the board to adopt rules and regulations is limited to the extent that a statutory provision cannot be altered or changed by a rule or regulation.

In connection with the above, it was held in Attorney General Opinion No. 35, Gould, March 18, 1969, that public school boards may grant leaves of absence with pay to teachers for the purpose of study and professional improvement; and that the agreement to grant leaves must be incorporated in the written terms of the employment contract and must be in exchange for services actually rendered during the contract period and not a gratuity. In addition, it was further pointed out that contributions to the Public

Mr. G. L. Donahoe

School Retirement System should be calculated during the teacher's leave of absence in the same manner as contributions are calculated during periods of actual service (copy of opinion attached). It is our view that the same consideration is applicable to the matter that has been presented.

As a result of the foregoing, it is our opinion that the board of trustees of the Public School Retirement System has the authority to adopt a regulation which will permit the retirement system to receive contributions for a member who is on a leave of absence from his teaching position with compensation from the employer for the period spent on leave; and the system is authorized to allow membership service credit for the time spent on leave for which contributions are remitted by the employer, but the authority of the board to adopt a regulation is limited to the extent that a statutory provision cannot be altered or changed by said rule or regulation.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 35
3-18-69, Gould

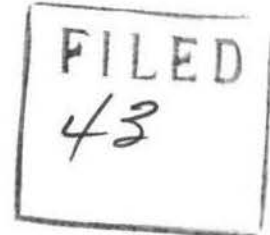
JURORS:
GRAND JURY:
CONSTITUTIONAL LAW:

Paragraph 2 of Section 494.020, RSMo Supp. 1971, renders any person who has served as a member of a grand jury panel prior to the effective date of the statute and within ten years next preceding his selection ineligible for service as a grand juror and such statute is constitutional.

OPINION NO. 43

February 2, 1972

Honorable Gene McNary
Prosecuting Attorney
St. Louis County Courthouse
Clayton, Missouri 63105



Dear Mr. McNary:

This is in response to your request for an opinion whether paragraph 2 of Section 494.020, RSMo Supp. 1971 precludes only a person who has served as grand juror after the effective date of this statute or precludes any person who has served on a grand jury within ten years preceding his selection including the period prior to the enactment of this statute from serving as a grand juror, and if so, whether the statute is constitutional.

Section 494.020, paragraph 2, RSMo Supp. 1971, provides:

"2. Any person who has served as a member of a grand jury panel within ten years next preceding his selection shall not be eligible for service as a grand juror."

Article I, Section 13 of the Constitution of Missouri provides:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

The question arises as to whether this statute applies to a person who served on the grand jury prior to its enactment.

The statute provides that any person who has served as a member of the grand jury panel within ten years next preceding his selection cannot be eligible for service as a juror.

Honorable Gene McNary

From the language used it is clear that the legislature intended the statute to apply to persons who have served on a grand jury panel within ten years next preceding his selection including the period prior to the enactment of the statute. It is our view the language used in this statute of the past tense indicates that was the intent of the legislature when it enacted the statute. The qualifications of a grand juror are determined at the time of his selection as a juror, and to hold that it applies only to persons who have served on the grand jury after the effective date of the statute would mean that it would be ten years before the statute would be fully effective which we believe is contrary to the intent of the legislature. *State ex rel. LeNeve v. Moore*, 408 S.W.2d 47 (Mo. banc 1966), and *Barbieri v. Morris*, 315 S.W.2d 711, 714 (Mo. 1958).

This leaves only the question as to whether it results in the statute's being retrospective in its operation in violation of Article I, Section 13 of the Constitution. In *Barbieri v. Morris*, supra, the director of revenue had suspended the license of a person to operate an automobile on the ground that he has been found to be a habitual violator of traffic laws under statute defining such habitual violators as a person who has been adjudged guilty of four moving traffic violations within two years. The issue was whether convictions prior to the effective date of the statute could be included, or whether only violations subsequent to the date of the statute could be considered under a statute which defined a habitual violator of traffic laws as any person who "has been adjudged guilty of at least four times in two years violating certain traffic laws or ordinances." In discussing the effect of this statute, the court stated, l.c. 714:

"'Retroactive' or 'retrospective' laws are generally defined, from a legal viewpoint, as those which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past.' *Lucas v. Murphy*, 348 Mo. 1078, 156 S.W.2d 686, 690. But it has been held specifically that a 'statute is not retrospective because it merely relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of a person for the purpose of its operation.' *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 232 S.W.2d 897, 900, 24 A.L.R.2d 340. It is said to be retroactive

'only when it is applied to rights acquired prior to its enactment.' 82 C.J.S. Statutes § 412. See also State ex rel. Ross, to Use of Drainage Dist. No. 8 of Pemiscot County v. General American Life Ins. Co., 336 Mo. 829, 85 S.W.2d 68, 74; Dye v. School District No. 32 of Pulaski County, 355 Mo. 231, 195 S.W.2d 874, 879; 16A C.J.S. Constitutional Law § 414. Paul admits in his brief that the right to drive an automobile is not a vested right, and as stated in State ex rel. Sweezer v. Green, supra, 'We have many times held that a statute is not retrospective in its operation within the constitutional prohibition, unless it impairs a vested right.'"

The question arises whether a person has a vested right to serve as a juror.

It is stated in 16 C.J.S., Constitutional Law, paragraph 221, no person has the vested right to serve as a juror. In Garrett v. Weinberg, 54 S.C. 127 (1898), it was contended inasmuch as a juror was convicted of larceny in 1871, prior to the adoption of the Constitution, at a time when, it is claimed, such conviction did not disqualify him from serving as a juror, he could not be disqualified by any subsequent legislation, either constitutional or statutory, as such legislation would be ex post facto, and, therefore, void under the provisions of the Constitution of the United States. In holding that qualifications of a juror may at any time be changed by the sovereign powers of the state without any violation of the ex post facto provision of the Constitution of the United States and without divesting any vested rights of a citizen, the court stated, l.c. 143:

"... As is said in Cooley on Const. Lim. (2d edit.), at page 598, in speaking of the so-called right to participate in elections: 'Each State establishes its own regulations on this subject--subject only to the fifteenth amendment to the National Constitution, which forbids that the right of citizens to vote shall be denied or abridged on account of race, color or previous condition of servitude. Participation in the elective franchise is a privilege rather than a right (italics ours), and it is granted or denied on grounds of general policy.' Hence a State may make any change in the law prescribing the qualifications of electors deemed necessary to effectuate its views

Honorable Gene McNary

of public policy, subject only to the provisions of the fifteenth amendment above referred to, and any legislation to that end possesses none of the features of an ex post facto law (see comments of Judge Cooley upon this subject in his work on Const. Lim., at p. 263, et seq.), and cannot be regarded as divesting any vested right of the citizen. If this be so as to the important matter of the qualifications of an elector, how much more is it true as to the qualifications of a juror. Indeed, service on a jury is not a matter of right, but a matter of public duty, the performance of which is enforceable by proper penalties. It cannot be regarded as a privilege, but on the contrary is usually regarded as a burden. Hence we see no reason why the State may not, from time to time, make such alterations in the law prescribing the qualifications of a juror by legislation, either constitutional or statutory, as the case may require, as may be regarded most conducive to the public welfare. A citizen cannot claim any vested right in any statutory privilege or exemption, unless it rests upon some consideration importing into it an element of contract. As is said in Cooley on Const. Lim., 383, 'The citizen has no vested right in statutory privileges or exemptions. Among these may be mentioned exemptions from the performance of public duty upon juries, or in the militia and the like. * * * All these rest upon reasons of public policy, and the laws are changed as the varying circumstances seem to require.' From these views it necessarily follows that when the question arises as to the qualifications of a given person to sit as a juror, such question must be determined by the law as it stands when such person is presented as a juror. . . ."

State ex rel. Flickinger v. Fisher, 119 Mo. 344 (1893), the question was whether a dentist was exempt from jury duty under a statute which exempted "practitioners of medicine." In discussing the subject of the qualifications of jurors, the court stated that the qualifications of jurors and exemption of certain citizens from jury service has always in this state been purely a subject of statutory regulation. The court stated, l.c. 355:

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"Service upon a jury of the country is a privilege as well as a duty, and, however regarded by the individual in any particular case is, in fact and in law, a position of honor and trust charged with the gravest responsibility, from the discharge of the duties of which no citizen ought to be exempted who is personally fit for the position, except for the general welfare. Exemption from jury service is not granted as a personal favor, but for the public comfort and convenience, and in the light of this reason for its existence, should the law governing such service be interpreted and administered."

It is our view that a person has no vested right to serve on a grand jury and that the above statutory provision is not in conflict with Article I, Section 13 of the Constitution because it does not violate any vested right of an individual.

CONCLUSION

It is the opinion of this office that paragraph 2 of Section 494.020, RSMo Supp. 1971, renders any person who has served as a member of a grand jury panel prior to the effective date of the statute and within ten years next preceding his selection ineligible for service as a grand juror and such statute is constitutional.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

January 7, 1972

OPINION LETTER NO. 44
Answer by Letter - Klaffenbach

Honorable Ray Lee Caskey
Prosecuting Attorney
Oregon County
Post Office Box 278
Alton, Missouri 65606



Dear Mr. Caskey:

This letter is in response to your opinion request in which you ask the following question:

"Section 57.409 [sic] states that a sheriff is given the duty of filing with the circuit court of the county a report on the conditions of the county jail, the number of prisoners confined in the jail, together with recommendations relating to its operation, and also provides that where the population is more than seven thousand five hundred and less than ten thousand the sheriff shall receive seven thousand and one hundred dollars. Where the sheriff has not made the reports, is he entitled to the compensation provided?"

You also state:

"In January 1969, Section 57.407 became law. This section sets up a duty of the sheriff of making reports to the Circuit court on the conditions of the county jail, the number of prisoners confined in the jail, together with recommendations relating to its operation, and provides that for this duty the sheriff will receive additional salary. The sheriff of Oregon County did not provide in his budgets

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for 1969, 1970, or 1971 for any increase in salary due to this section. Nor did he file any reports in 1969, 1970 or 1971 pursuant to the above noted statute. When the books were audited in 1971, the auditors office indicated that the county owed the sheriff \$ _____ which he was entitled to because of the above noted section. Now the question arises--is the sheriff entitled to the increase in salary even if he hasn't done the duties provided for in this section?"

Section 57.407, RSMo 1969, relating to sheriffs in third class counties was a part of Senate Bill No. 165 of the 75th General Assembly.

That section provides in full:

"1. The sheriff in counties of the third class shall on January first of each year and every three months thereafter file with the circuit court of the county a report on the conditions of the county jail, the number of prisoners confined in the jail, together with recommendations relating to its operation.

"2. In addition to the salary, travel expenses, reimbursement expenses, and any other compensation now provided by law, the sheriff in each county of the third class, for the performance of these duties, shall receive the following sums per year: In counties having a population of less than seven thousand five hundred, the sum of six thousand eight hundred dollars; in counties having a population of seven thousand five hundred and less than ten thousand, the sum of seven thousand one hundred dollars; in counties having a population of ten thousand and less than eleven thousand five hundred the sum of seven thousand four hundred dollars; in counties having a population of eleven thousand five hundred and less than fifteen thousand, the sum of seven thousand seven hundred dollars; in counties having a population of fifteen thousand and less than twenty-four thousand, the sum of seven thousand nine hundred dollars; in counties having a population of twenty-four thousand and less than thirty thousand, the sum of seven thousand eight hundred dollars; and in counties

Honorable Ray Lee Caskey

having a population of thirty thousand and more, the sum of seven thousand five hundred dollars, payable in twelve equal monthly installments out of the county treasury, by warrants drawn by the county court upon the county treasury.

"3. In counties of the third class after October 13, 1969, the sheriff shall pay all fees collected by him in civil matters, and which were previously retainable by him, into the county treasury, except charges for each mile traveled, allowable to him, which he may retain, in serving civil process.

"4. Notwithstanding other provisions of this section the total compensation of sheriffs of counties of the third class with an assessed valuation of less than twenty million dollars shall not exceed ten thousand dollars, excluding mileage."

In our Opinion No. 525, dated December 16, 1969 to the Honorable N. William Phillips, copy enclosed, this office held that the sheriff of a third class county was entitled to the additional compensation even though such county had no county jail. We are also enclosing a copy of Opinion No. 387, dated October 9, 1969 to the Honorable Robert B. Paden which also discusses Senate Bill No. 165.

Under the holding of State v. Carpenter, 388 S.W.2d, 823 (Mo. 1965) which we cited in our opinion to Phillips, an officer is entitled to the emoluments of his office even though he does not perform his duties. This appears to be a well settled rule as indicated in Vol. 22A Missouri Digest, Officers, p. 72.

In the same context it is interesting to note that the Missouri Supreme Court in Reed v. Jackson County, 142 S.W.2d 862 (1940) held that it is against public policy for public officers to, by agreement or otherwise, accept a lesser compensation than that provided by law.

Although Section 57.407 states that the payment provided for therein is for the additional services required nevertheless such compensation becomes a part of the emoluments of the office and it is our view, in answer to your question, that even though such an officer does not render the services, he is entitled to such payments.

Finally, we note that the act is mandatory in that the duties shall be performed by the sheriff. We do not pass upon the question of whether such refusal constitutes sufficient grounds for removal

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of the sheriff from office in an appropriate action or whether the performance of such duties can be enforced by an appropriate order directed to the sheriff by the circuit court with which he is required to file the report.

Finally, you indicate that the amount provided in Section 57. 407 for the performance of such duties has not been properly budgeted. In this respect we note that in Gill v. Buchanan County, 142 S.W.2d 665, (Mo. 1940) the court considered whether the county was liable for a county judge's salary when the county had failed to make sufficient allowance in the county's budget for the payment of such salary. In holding that the county could not discharge all or part of its obligation by failing to budget the full salary due such officer, the Supreme Court stated at l.c. 668:

" . . . Certainly such annual obligations imposed upon the county by the Legislature would be valid from the first of the year, if within the limits of the constitutional provisions fixing the county's authority to raise revenue during each year to pay them; and no part of any such obligation could become invalid merely because the county court decided to incur other obligations for different purposes during the year. To so hold would amount to recognition of authority in the county court to ignore statutes, and to say that it could make its own choice as to whether it would follow valid acts of the Legislature or use all of its revenue for different purposes. . . ."

The Court continued stating:

" . . . Certainly such obligations imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. . . ."

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 525, 12/16/69, Phillips
Op. No. 387, 10/9/69, Paden

TAXATION (SALES & USE):
CONSTITUTIONAL LAW:
STATE COLLEGES:
UNIVERSITIES:

The University of Missouri is
subject to the imposition of a
sales tax by a municipality on
sales made by the University.

If the University is delinquent
only on payments owed to the city, the city must bring an appropriate action to collect the tax.

OPINION NO. 45

February 14, 1972

Honorable A. Basey Vanlandingham
Missouri Senate, District 19
Room 333 Capitol Building
Jefferson City, Missouri 65101



Dear Senator Vanlandingham:

In your recent opinion request, you asked whether sales by the University of Missouri are subject to a one-cent sales tax imposed by the City of Columbia pursuant to authority granted by Section 94.500 et seq., RSMo.

Section 94.500 et seq., RSMo, commonly known as the "City Sales Tax Act" permits certain cities in this state to adopt an ordinance imposing a sales tax on transactions deemed to occur within that city. To answer this question, an examination of the relationship between the General Assembly of Missouri, the University of Missouri, and municipalities is required. In addition, attention must be given to the specific language of the city sales tax act and statutes incorporated by reference therein.

The University of Missouri is an entity created by Article IX of the Constitution of Missouri. Section 9(a) vests the government of the State University in a Board of Curators. Section 9(b) of Article IX requires the General Assembly to adequately maintain the State University. Chapter 172 of the Revised Statutes of Missouri delineates a number of powers granted to the University by the General Assembly. Section 172.020, RSMo 1969 states, in relevant part:

"The university is hereby incorporated and created a body politic, and shall be known by the name of 'The Curators of the University of Missouri', . . ."

At an early date, the courts of this state were called upon to determine precisely the legal status of the University of Missouri. In 1871, the Supreme Court of Missouri decided the case of Head v. Curators of the University of the State of Missouri, 47 Mo. 220 (1871). In that case, one Bolivar Head sued the university, alleging that an employment contract had been breached. Mr. Head's position had been abolished by the General Assembly. In the Head case, the Court ruled against the plaintiff, stating:

"Whether the university and its affairs are subject to the direction and control of the Legislature, depends upon its character as a corporation, whether public or private. If it is a private corporation, the Legislature has no control over its internal management. On the other hand, if it is a public corporation--a State institution--it is subject to the discretionary control of the lawmaking department of the State government.

"The university is clearly a public institution, and not a private corporation. . . .

". . . By establishing the university the State created an agency of its own, through which it proposed to accomplish certain educational objects. In fine, it created a public corporation for educational purposes-- . . ." (47 Mo. 224, 225).

The decision was appealed to the Supreme Court of the United States, where it was affirmed, 19 Wall. 56, 22 L.Ed. 160 (1874). The Supreme Court of the United States supported the categorization of the university as a state agency by observing that the plaintiff accepted his office subject to the laws then extant and subject to such subsequent laws as should seem wise to the legislature.

The principle established by the Head case, that the university is a state agency and therefore subject, within constitutional limitations, to control by the General Assembly, has been consistently expressed in other decisions concerning the University of Missouri. In the decision of State ex rel. Heimberger v. Board of Curators of the University of Missouri, 188 S.W. 128 (Mo. banc 1916), the University of Missouri contended that a constitutional provision, (now Article IX, Section 9(a)) deprived the General Assembly of all power to legislate with respect to the establishment of new departments or new courses of study in established departments. The Court, after a lengthy discussion, rejected this argument, stating:

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" . . . To say the General Assembly by that language intended to divest itself of the power to legislate respecting the university would be unreasonable. . . ."
(188 S.W. 135)

The concept of legislative control of the university was once again recognized in Todd v. Curators of the University of Missouri, 147 S.W.2d 1063 (Mo. 1941). In that case, the Court held the statutory provision (now 172.020) stating that the university may sue and be sued does not authorize a suit against it for negligence. The Court reasoned that the university is a public corporation, performing governmental functions, and thus an agency of the state. As such, the immunity of the institution from suit for negligence would have to be changed by positive legislative enactment.

Other jurisdictions have characterized their universities as "creatures", "agencies", and "arms of the state", and thus subject to absolute control by the legislature, within constitutional limitations. E.g., Board of Regents of the Universities and State College of Arizona v. City of Tempe, 356 P.2d 399 (Ariz. 1960); People ex rel. Board of Trustees of the University of Illinois v. Barrett, 46 N.E.2d 951 (Ill. 1943); Daniel's Administrator v. Hoofnel, 155 S.W.2d 469 (Ky. 1941); Kentucky Institution for Education of Blind v. City of Louisville, 97 S.W. 402 (Ky. 1906); McCready v. Byrd, 73 A.2d 8 (Md. 1950); Egan v. Moore, 235 N.Y.S.2d 995 (Sup. 1962); University of Utah v. Board of Examiners of State of Utah, 295 P.2d 348 (Utah 1956); State ex rel. West Virginia Board of Education v. Sims, 101 S.E.2d 190 (W.Va. 1957).

Numerous decisions have held that a municipal corporation has no inherent authority to impose a tax. The authority for a municipal corporation to impose a tax must be based ultimately on a specific or clearly implied grant of power from the state legislature. E.g., Carter Carburetor Corporation v. City of St. Louis, 203 S.W.2d 438 (Mo. banc 1947); Kansas City v. Frogge, 176 S.W.2d 498 (Mo. 1944). Absent a specific grant of authority, a municipal corporation is powerless to impose any obligation upon a state agency, including the university. Board of Regents of the Universities and State College of Arizona v. City of Tempe, *supra*; State ex rel. Curators of the University of Missouri v. McReynolds, 193 S.W.2d 611 (Mo. banc 1946); James A. Finch, Jr. v. City of Kansas City (unreported decision of the Circuit Court of Jackson County, Missouri 1964, Case No. 659578).

It is also well established that the power to tax is a sovereign function and may be exercised or delegated by the legislature, subject only to constitutional and statutory limitations. E.g.,

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General Installation Company v. University City, 379 S.W.2d 601 (Mo. banc 1964); State ex rel. Missouri Portland Cement Company v. Smith, 90 S.W.2d 405 (Mo. banc 1936). It has also been held that it is within the power of the legislature to impose certain taxes upon state agencies. State ex rel. Missouri Portland Cement Company v. Smith, supra.

The decision of Kansas City v. School District of Kansas City, 201 S.W.2d 930 (Mo. 1947) discussed the relationship between the state and its agencies. That decision observed:

"[The] City's and School District's powers stem from the same sovereignty. The State (subject to constitutional limitation) can exercise its powers or delegate and apportion them to and between its agencies as it desires. . . ." (201 S.W.2d 932)

Thus, the General Assembly of the State of Missouri can authorize its "agencies" or "creatures" to impose certain obligations upon each other.

Section 94.540, RSMo 1969, is the section of the "City Sales Tax Act" that lists the exemptions from the imposition of this tax. That provision states, in relevant part:

"1. The following provisions shall govern the collection by the director of revenue of the tax imposed by sections 94.500 to 94.570:

"(1) All applicable provisions contained in sections 144.010 to 144.510, RSMo, governing the state sales tax shall apply to the collection of the tax imposed by sections 94.500 to 94.570, except as modified in sections 94.500 to 94.570;

"(2) All exemptions granted to agencies of government, organizations, persons and to the sale of certain articles and items of tangible personal property and taxable services under the provisions of sections 144.010 to 144.510, RSMo, are hereby made applicable to the imposition and collection of the tax imposed by sections 94.500 to 94.570."

The above quoted statutory provision is a reference statute, incorporating the exemptions as stated in the sales tax act (Chapter 144). Such incorporation by reference is a permissible legislative device in Missouri. General Installation Company v. University City, supra.

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When the City Sales Tax Act was enacted, Section 144.040, one of the sales tax exemption provisions, exempted ". . . all sales made by or to, . . . educational institutions supported by public funds . . ." In 1971, Senate Bill No. 72 changed Section 144.040 to read as follows:

"(1) In addition to the exemptions under section 144.030, there shall also be exempted from the provisions of sections 144.010 to 144.510 all sales made by or to religious and charitable organizations or institutions and all sales made by and to all elementary and secondary schools operated at public expense, in their religious, charitable or educational functions and activities.

"(2) There shall also be exempted from the provisions of sections 144.010 to 144.510 all sales made to eleemosynary and penal institutions and industries of the state, and all sales made to any institution of higher education supported by public funds, and all sales made to a state relief agency in the exercise of relief functions and activities." (RSMo Supp. 1971)

Thus, as far as the state sales tax is concerned, the change in Section 144.040 changes the exemption of state universities by exempting them from the sales tax act only on sales made to such institutions.

In light of the foregoing, the critical inquiry is whether the change in the exemption wrought by Senate Bill No. 72 removes the exemption from the City Sales Tax Act on sales made by an educational institution supported by public funds. The general rule governing the effect of a change in a statute incorporated by reference in another statute is that where an adopting statute incorporates another statute by a specific reference to the statute adopted, the incorporation does not include subsequent modifications or repeals of the adopted statute but where the reference is to the general law, the reference will be regarded as including not only the law on that subject in force at the date of the adopting act, but also the law as it exists subsequently. This rule of construction has been said to apply only in the absence of any indication of the adopting statute of a contrary legislative intent. Professional and Business Men's Life Insurance Company v. Banker's Life Company, 163 F.Supp. 274 (D. Mont. 1958); Note, Legislation By Reference, 1950 Wis. L.Rev. 726; Annotation, 168 A.L.R. 627 (1947).

The Missouri rule on incorporation by reference was stated in the decision of State v. Rogers, 161 S.W. 770 (Mo. 1913). The Missouri rule is:

"When a reference statute specifically designates the section or article of the statute of which it is made a part, such reference statute will not be changed or modified by any subsequent change in the statute to which it refers. . . . where the reference statute pertains only to a method of procedure and refers generally to some statute which defines how certain things may be done, such reference statute will be expended, modified, or changed every time the statute referred to is changed by the Legislature." (161 S.W. 772)

In the Rogers case, the statutory provision referred to was one dealing with appeals. The statutory reference was found to be a general one in that case. In the decision of Gaston v. Lamkin, 21 S.W. 1100 (Mo. 1893), the specific versus general language distinction was drawn. The decision of Turner v. Missouri-Kansas-Texas R. Co., 142 S.W.2d 455 (Mo. 1940) also expressed the view that when a reference is made to a general statute, subsequent amendments are to be given full force. The statute in that case dealt with limitations of actions and was held to be a general one.

Other jurisdictions have wrestled with the problem of what constitutes a specific or general statute, for the purposes of reference by incorporation. In addition to the sources cited supra, the following decisions have followed the principles expressed by the Missouri courts: Carruba v. Meeks, 150 So.2d 195 (Ala. 1963); Byrd v. Short, 307 S.W.2d 871 (Ark. 1957); State of Iowa v. District Court in and for Delaware County, 114 N.W.2d 317 (Ia. 1962); Western Casualty & Surety Co. v. Young, 339 S.W.2d 277 (Tex.Civ.App. 1960); Union Cemetery v. City of Milwaukee, 108 N.W.2d 180 (Wis. 1961). The Union Cemetery case, supra, distinguished between a specific and general reference by observing that a specific reference referred specifically to a particular statute by its title or section number and incorporates only a part of the law on a subject. A general reference statute refers generally to the law on a subject and incorporates the entire subject matter.

In applying the above-stated rules of construction, it is the opinion of this office that the rules governing incorporation by general reference apply in this instance. The provision of the City Sales Tax Act incorporating the exemptions of the sales tax act does so in broad terms. Its reference to statutory sections includes the entire range of the applicable provisions of the state sales tax act--Sections 144.010 to 144.510. There is no reference to a particular provision of the sales tax act. The language used in Section 94.540, paragraph 1, subsections (1) and (2) also clearly indicate that the provisions incorporated are ones generally dealing with sales tax and exemptions thereto. Paragraph 1 of Section 94.540 states as follows:

Honorable A. Basey Vanlandingham

"1. The following provisions shall govern the collection by the director of revenue of the tax imposed by sections 94.500 to 94.570:

"(1) All applicable provisions contained in sections 144.010 to 144.510, RSMo, governing the state sales tax shall apply to the collection of the tax imposed by sections 94.500 to 94.570, except as modified in sections 94.500 to 94.570;

"(2) All exemptions granted to agencies of government, organizations, persons and to the sale of certain articles and items of tangible personal property and taxable services under the provisions of sections 144.010 to 144.510, RSMo, are hereby made applicable to the imposition and collection of the tax imposed by sections 94.500 to 94.570."

An examination of subparagraph 1 reveals that the law incorporated by that provision is the general law contained in the sales tax chapter pertaining to the collection of tax. Subparagraph 2 also refers to the general law concerning exemptions. The use of the numerical references in these subsections (144.010 to 144.510) is the same as stating the sales tax act. As such, the language does not contain the specificity required to compel a holding that a specific provision of law was incorporated. In addition, it is apparent that the legislative intent was not to establish a standard for the city sales tax exemption that differed from those of the state sales tax. Section 94.530, RSMo 1969 requires the state director of revenue to bear the administrative burdens of collecting this tax. In light of this, the intent of the legislature is clear that the standards applicable to the state sales tax should be in conformity with those of the city sales tax.

Your opinion request also asks the following question:

"B. If the University is subject to the State statute and city ordinance, which of the following is obligated and/or entitled to enforce the law as per Section 94.570?

- (1) The City of Columbia
- (2) The State Director of Revenue
- (3) The State of Missouri Attorney General"

Section 94.570, RSMo 1969 provides the answer to this question. Where a person is delinquent in the payment of sales taxes to both the state and city, the Director of Revenue is required to notify

Honorable A. Basey Vanlandingham

the tax collector of the city affected and turn the case over to the Attorney General for collection. When the Attorney General brings an action for the collection of the delinquent tax, the city may join in such suit as a party plaintiff.

The statute further provides that, in the event a person pays the state sales tax but is delinquent in the payment of the city sales tax, ". . . the director of revenue shall promptly notify the tax collector of the city to which the tax would be due so that appropriate action may be taken by the city." Section 94.570, RSMo 1969. Thus, if sales taxes allegedly are owed only the city, the city must maintain an action for their collection.

CONCLUSION

It is the opinion of this office that the University of Missouri is subject to the imposition of a sales tax by a municipality on sales made by the University. If the University is delinquent only on payments owed to the city, the city must bring an appropriate action to collect the tax.

The foregoing opinion which I hereby approve was prepared by my assistant, Peter H. Ruger.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

LIQUOR:
LICENSES:
CRIMINAL LAW:
CONTRABAND:

The possession of "winemaking kits" fit for the use in the unlawful manufacture of intoxicating liquor, by business establishments or individuals who are not licensed by the state to manufacture intoxicating liquor, constitutes a violation of the Missouri Liquor Control law. However, this law does not prohibit the possession of winemaking equipment that is held for sale exclusively to businesses or individuals holding a state license to manufacture wine.

OPINION NO. 47

May 22, 1972

Mr. Courtney Goodman, Supervisor
Department of Liquor Control
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Goodman:

This is in response to the request made by your predecessor for our opinion concerning the possession of winemaking kits by business establishments or individuals not licensed by the State of Missouri to manufacture intoxicating liquor.

Specifically, you have asked:

"Does the possession of winemaking kits by business establishments or individual who are not licensed by the State to manufacture intoxicating liquor constitute a violation of the Missouri Liquor Control Law?"

For the purposes of this opinion, it is assumed that the "winemaking kits" in question are held for sale to the general public by retail establishments, and are designed for home rather than commercial use. It is our understanding that these "winemaking kits" are not held for sale exclusively to licensed manufacturers of intoxicating liquor. It is also assumed that the "winemaking kits" may be used to manufacture intoxicating liquor as defined by Section 311.020, RSMo 1969. This section reads as follows:

"The term 'intoxicating liquor' as used in this chapter, shall mean and include alcohol for beverage purposes, alcoholic, spirituous, vinous, fermented, malt, or other liquors, or

Mr. Courtney Goodman

combination of liquors, a part of which is spirituous, vinous, or fermented, and all preparations or mixtures for beverage purposes, containing in excess of three and two-tenths percent of alcohol by weight."

Section 311.050, RSMo 1969, makes it unlawful to manufacture intoxicating liquor without a license. That section reads:

"It shall be unlawful for any person, firm, partnership or corporation to manufacture, sell or expose for sale in this state intoxicating liquor, as defined in section 311.020, in any quantity, without taking out a license."
(Emphasis added)

This office has formerly held that a person may not manufacture intoxicating liquor for personal use in his home without obtaining a license and paying the fees required by Sections 311.180 or 311.190, RSMo 1969. (Opinion of the Attorney General No. 48, Ketchum, 1954).

It is noted that the "winemaking kits" you refer to are advertised for home use and some of these advertisements make the representation that it is lawful to manufacture wine in the home without a state license. This, of course, is a misrepresentation of the law.

Section 311.810, RSMo 1969, in pertinent part, provides:

". . . provided, that all persons engaged in the work of unlawfully manufacturing intoxicating liquors in any building, structure, motor vehicle or other conveyance, or at any place as defined in this chapter, or of keeping, storing or selling intoxicating liquor in violation of this law or of any of the laws of this state, or assisting in any way in such unlawful manufacture, production, keeping, storing, selling or transporting same, and all persons in possession or control, whether owners or not, of any still, doubler, worm, worm tub, mash, mash tub, fermenting tub, vessel, fixture or equipment used or fit for use in the unlawful manufacture or production of intoxicating liquor, . . . shall be deemed equally guilty of a violation of this law; . . ."
(Emphasis added)

Mr. Courtney Goodman

This statute further provides that it shall be the duty of any officer to seize equipment fit for use in the unlawful manufacture of intoxicating liquor as follows:

" . . . It shall be equally the duty of any officer to seize and hold without first obtaining a search warrant, any intoxicating liquor, still, doubler, worm, worm tub, mash, mash tub, fermenting tub, vessel, fixture or equipment, or any part or parts thereof, which he may find in use or fit for use in the unlawful manufacture of intoxicating liquor and to report same immediately to the prosecuting attorney of the county in which such liquor, articles and equipment may be found; . . ." (Emphasis added)

It is the opinion of this office that Section 311.810 operates to prohibit the possession of "winemaking kits" by businesses or persons not licensed to manufacture intoxicating liquor. Moreover, Section 311.810 declares such articles to be contraband as follows:

" . . . All intoxicating liquor unlawfully manufactured, . . . and the containers thereof and all equipment used or fit for use, in the unlawful manufacture of intoxicating liquor, and which are found at or about any still or outfit for the unlawful making or manufacture of intoxicating liquor, are hereby declared contraband, . . ." (Emphasis added)

The Missouri Liquor Control law, however, does not prohibit the possession of winemaking equipment that is held for sale exclusively to businesses or individuals holding a state license to manufacture wine.

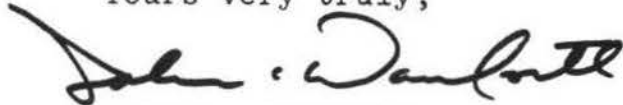
CONCLUSION

It is the opinion of this office that the possession of "winemaking kits" fit for the use in the unlawful manufacture of intoxicating liquor, by business establishments or individuals who are not licensed by the state to manufacture intoxicating liquor, constitutes a violation of the Missouri Liquor Control law. However, this law does not prohibit the possession of winemaking equipment that is held for sale exclusively to businesses or individuals holding a state license to manufacture wine.

Mr. Courtney Goodman

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard S. Paden.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN C. DANFORTH
Attorney General

FIRE PROTECTION DISTRICTS:

1. A fire protection district in constitutional charter counties has authority to contract with another fire protection district for providing a joint fire and emergency dispatching service. The dispatching center which furnishes the dispatching service may hire a chief dispatcher but does not have authority to contract with a private corporation to furnish a chief dispatcher.

2. A chief dispatcher as required in Section 321.245, RSMo 1969, to be in charge of the operation and directly responsible to the management of the dispatching service is not required to be physically present twenty-four hours a day seven days a week. Such chief dispatcher must give his position his complete and undivided attention and may not engage in any other activities that would either consume any of the portion of the time required for him properly to function as chief dispatcher or which would in any respect interfere with his ability to perform his duties.

OPINION NO. 48

March 22, 1972

Honorable J. Anthony Dill
Representative, District 44
Room 235A, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Dill:

This is in response to your request for an opinion from this office as follows:

"1. May Fire Protection District in St. Louis County, incorporated under Chapter 321 R.S.Mo.1969, which is levying a dispatching tax pursuant to the provisions of section 321.243, contract with a private person, firm or corporation to provide the services of chief dispatcher as required by Section 321.245 (4), providing such private person, firm or corporation has at least a second class radio telephone license issued by the Federal Communications Commission, and is otherwise qualified by the provisions of this section?

"2. Is it necessary that a person, firm or corporation possessing the qualifications of chief dispatcher as set out in Section 321.245 (4) be present in the dispatching center on a 24 hour 7 day basis? Is it necessary that a person, firm or corporation possessing

Honorable J. Anthony Dill

the qualifications of chief dispatcher as described in Section 321.245 (4) be on call and available to the dispatching center on a 24 hour, 7 day basis to fulfill the requirements of said Section?"

As we understand the facts, the South St. Louis County fire dispatching center, a joint agency operated by seven cooperating fire protection districts, presently retains an individual as chief dispatcher and that the dispatching center may have the opportunity to contract with an independent corporation to provide the chief dispatcher; and you inquire whether the dispatching center has the legal authority to contract with an independent corporation as chief dispatcher or to furnish a chief dispatcher.

Section 321.220, RSMo 1969, provides that a fire protection district shall have the following powers, authority and privileges including:

"(4) To enter into contracts, franchises and agreements with any person, partnership, association or corporation, public or private, affecting the affairs of the district, including contracts with any municipality, district or state, or the United States of America, and any of their agencies, political subdivisions or instrumentalities, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service relating to the control or prevention of fires, including the installation, operation and maintenance of water supply distribution, fire hydrant and fire alarm systems; provided, that a notice shall be published for bids on all construction or purchase contracts for work or material or both, outside the authority contained in subdivision (9) below, involving an expense of two thousand dollars or more;"

Under this statute a fire protection district is given express authority to enter into contracts, franchises and agreements with any person, partnership, association, corporation, public or private, affecting the affairs of the district.

Section 321.243, RSMo, provides:

"1. Notwithstanding any other provision of law, an additional tax of not to exceed three

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cents per one hundred dollars of assessed valuation may be levied and collected by any city, town, village, or fire protection district all or part of which is located in a county of the first class having a charter form of government, but all the funds derived from such tax shall be used solely for the purpose of providing a joint, central fire and emergency dispatching service.

"2. The additional tax prescribed by this section shall be levied only when the governing body of the city, town, village, or fire protection district determines that a central fire and emergency dispatching center is available, that the center meets the minimum requirements set by section 321.245, and when the governing body has entered into a contract with the center for fire and emergency dispatching services. The funds from the tax shall be kept separate and apart from all other funds of the city, town, village, or fire protection district, and shall be paid out only on order of the governing body."

A basic rule of statutory construction is to seek legislative intention, which should be ascertained from the words used, if that is possible, and in so doing, words should be given their plain and ordinary meaning so as to promote object and manifest purpose of statute, *State ex rel. State Highway Commission v. Wiggins*, 454 S.W. 2d 899 (Mo. banc 1970).

It is our opinion that under this statute any city, town, village or fire protection district all or part of which is located in a county of the first class having a charter form of government may levy a tax not to exceed three cents per one hundred dollars assessed valuation to be used solely for the purpose of providing a joint, central fire and emergency dispatching service. This tax can be used only for a joint dispatching service with another fire protection district or municipal corporation.

The question under consideration concerns only the furnishing or hiring the chief dispatcher. Section 321.245, RSMo, provides in part that no central dispatching center shall qualify to receive any of the funds collected pursuant to Sections 321.243 and 321.245, RSMo, unless it meets the following minimum equipment and personnel requirements including:

"(4) A chief dispatcher to be in charge of operations, who must have at least a Federal

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Communications Commission second class radio telephone license, and who shall be directly responsible to the management of the dispatching service; plus

"(5) Sufficient senior dispatchers to provide twenty-four hour attendance at the center; plus

"(6) Such assistant dispatchers as may be necessary to provide two-man switchboard operation during certain hours as prescribed in sections 321.243 and 321.245;

* * *

"2. A minimum of two dispatchers shall be on duty at all times in any central dispatching center between the hours of 7:00 a.m. and 11:00 p.m. If only one dispatcher is on duty at other times, a twenty-minute watchman's check shall be maintained.

"3. All dispatchers shall be at least twenty-one years of age and not more than seventy years of age. They shall devote their full time to this occupation. Each dispatcher must be capable of operating all equipment used in the dispatching center.

"4. Each dispatching center shall employ sufficient personnel to insure that no person will be required to be on duty without at least twelve hours between shifts."

It is our opinion that under the above statute the chief dispatcher has to be in charge of the operation of the dispatching center, have at least a Federal Communications Commission second class radio telephone license, and be directly responsible to the management of the dispatching service. A corporation is not qualified for a Federal Communications Commission second class radio telephone license. 47 U.S.C.A., Section 303(l) (1), Rules and Regulations of the Federal Communications Commission. Under Section 321.245(4), supra, the chief dispatcher has to be responsible to the management of the dispatching service, which in this case, consists of the several fire protection districts operating the joint service. The chief dispatcher under these conditions has to be under the control and responsible to the dispatching center. Therefore, it is our view that the dispatching center cannot contract with a private corporation to furnish a chief dispatcher.

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In answer to your second question, it is our opinion that subsection 4 of Section 321.245, supra, which requires the chief dispatcher to be in charge of the dispatching service and directly responsible to the management of the dispatching service is to be given a reasonable construction and that he is not required to be on duty twenty-four hours a day seven days a week but require him to give such time and devote such service as is necessary for the performance of his duties. We believe this is a matter between the dispatching center and the employee regarding his hours of service. Statutes which define the duties of a public employee should be reasonably construed. Section 321.245(3), supra, requires all dispatchers to devote their full time to this occupation. In Opinion No. 130 issued by this office on March 22, 1966 (a copy enclosed), the term "full time" as used in a statute was defined. It is our opinion that the chief dispatcher is not required to be physically present at the dispatching center twenty-four hours a day seven days a week, but that he is required to devote full time to the performance of his duties as such phrase is ruled in attached Opinion No. 130.

CONCLUSION

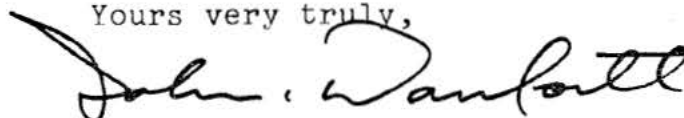
It is the opinion of this office that:

1. A fire protection district in constitutional charter counties has authority to contract with another fire protection district for providing a joint fire and emergency dispatching service. The dispatching center which furnishes the dispatching service may hire a chief dispatcher but does not have authority to contract with a private corporation to furnish a chief dispatcher.

2. A chief dispatcher as required in Section 321.245, RSMo 1969, to be in charge of the operation and directly responsible to the management of the dispatching service is not required to be physically present twenty-four hours a day seven days a week. Such chief dispatcher must give his position his complete and undivided attention and may not engage in any other activities that would either consume any of the portion of the time required for him properly to function as chief dispatcher or which would in any respect interfere with his ability to perform his duties.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 130
3-22-66, Sloan

LAW ENFORCEMENT ASSISTANCE COUNCIL:
EXECUTIVE ORDER:
COMPENSATION:
CONFLICT OF INTEREST:

Such Council may properly determine the compensation and allowances of the Chairman.

The Governor of Missouri properly established the Missouri Law Enforcement Assistance Council by Executive

January 11, 1972

OPINION NO. 50

Honorable William L. Culver, Executive Director
Missouri Law Enforcement Assistance Council
P. O. Box 1041
Jefferson City, Missouri 65101



Dear Mr. Culver:

This opinion is in response to your request which is stated as follows:

"1. The Missouri Law Enforcement Assistance Council was established by Executive Order of the Governor within the Department of Community Affairs, pursuant to the Omnibus Crime Control and Safe Streets Act. Appropriations have been made by the General Assembly for the operation of MOLEAC. Is the establishment of the Council by Executive Order sufficient to create it as a legally constituted body without the necessity of statutory authorization or is statutory authorization needed?

"2. If the Chairman of the Missouri Law Enforcement Council, who is also a member is compensated as Chairman for duties which are essentially full-time, is there any conflict of interest which violates Section 105.490 RSMo 1969 or any other Missouri law?"

With respect to the background of the Missouri Law Enforcement Assistance Council you furnished us the following information:

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"On June 19, 1968, Congress passed Public Law 90-351. The Omnibus Crime Control and Safe Streets Act of 1968. Congress Declared its policy to 'assist State and local governments in strengthening and improving law enforcement at every level by national assistance. It was the purpose of the act to 1) encourage states ... to prepare and adopt comprehensive plans ... 2) authorize grants to states ... to improve and strengthen law enforcement and 3) encourage research and development directed toward the improvement of law enforcement.' The Act further provides that the governor of the state shall create a state planning agency which shall:

- 1) develop a comprehensive statewide plan for the improvement of law enforcement throughout the state;
- 2) define, develop and correlate programs and projects for the state and the units of local government; and,
- 3) establish priorities for the improvement in law enforcement throughout the state.

"On August 19, 1968, pursuant to the federal statute, Governor Hearnese issued an executive order establishing within the Department of Community Affairs, an 'agency for the purpose of crime control planning and implementation of such plans. The Executive Order also established a commission to be appointed by the Governor, consisting of persons "professionally concerned with law enforcement and the public at large" to be "charged with the responsibility for formulating policy and plans of action for the implementation of the OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968."' On January 17, 1969, the Governor issued a second Executive Order designating the Missouri Law Enforcement Assistance Council as the state planning agency to administer and implement the provisions of the Juvenile Delinquency Prevention and Control Act of 1968."

We also note that the national publication entitled "Report on the Office of the Attorney General" dated February 1971 at l.c. 495 et seq. reported a study on such state planning and their operation throughout the various states of the United States. The report notes in particular, that

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the Omnibus Act relied heavily upon state government as planners, administrators, coordinators and innovaters and that the states are assigned the major share of the administrator's responsibility for the program. In particular the report noted, l.c. 506.:

"The law required that the S.P.A. be designated by the Governor and subject to his jurisdiction. It could be either a specially-established unit of state government, or an existing body. Organization and structure were matters of state discretion, but the state planning agency must:

- (1) be a definable agency in the executive branch of State government charged with and empowered to carry out the responsibilities imposed by the Act;
- (2) have a supervisory board (i.e., a board of directors, commission, committee, council, etc.) which has responsibility for reviewing, approving and maintaining general oversight of the State plan and its implementation, of action priorities, of sub grants or allocations to localities, and of other planning agency functions;
- (3) have an administrator and staff who devote full time to the agency's work.

"Most states created, either by executive order, statute, or a combination of the two, an independent agency attached to the Governor's office or to some other executive department...."

In addition with respect to the composition of the boards the report states:

"The Act specified that a state planning agency 'shall be representative of law enforcement agencies of the State and of the units of general local government within the State.' L.E.A.A. Guidelines said that 'the composition of such boards may vary from State to State; however, balanced representation is required'..."

While there is little doubt that the Governor under normal circumstances is limited with respect to his power to appoint officers and assign duties to such officers, 38 Am.Jur.2d Governor § 5, we have no Missouri or other case law to guide us in the premises possibly for the reason that the courts, including the Missouri Supreme Court, *State ex rel Robb v. Stone* 25 S.W. 376 (1894), have always been reluctant to interfere with the execution of the executive function. This is true because the Governor

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in acting in his political capacity in carrying on the appropriate functions of the State executes a duty for which he is in nowise amenable to the judiciary. State ex rel. Bartley v. Governor 39 Mo. 390 (1867). However, in short answer to your question with respect to the Governor's powers to appoint such counsel for such purposes we call your attention to Opinion No. 469 dated March 29, 1965 to Sargent Shriver, copy enclosed, in which we held that the Governor had the authority to designate his Administrative Assistant for Urban Affairs to be the appropriate state agency to carry out the state's program of technical assistance under the Economic Opportunity Act of 1964 and that such agency was properly created and termed Missouri Office of Economic Opportunity by the Governor, which was a fictitious name used to describe the program within the Office of the Governor.

By comparison in this instance the Governor has made his designation and appointment of council members in implementation of such federal acts within the Department of Community Affairs which itself is vested with extremely broad powers with respect to Federal cooperation and planning under Chapter 251 RSMo.

As we have further noted above from our quotations from the publication entitled "Report on The Office of the Attorney General" it has been common practice within many states to create such councils by executive order or alternatively by statute or by a combination of the two. Since the Governor has acted in this respect consistent with the previous policy of this office as indicated by our prior opinion, and in furtherance of the planning requirements of the federal statutes it is our view, in answer to your first question, that the Governor properly established the Council by Executive Order and created it as a legally constituted body.

Your second question asks whether there is any conflict of interest if the Chairman of the Council is compensated for his performance as Chairman.

In that respect the facts furnished us in particular with respect to Mr. Isaac Gurman show that Mr. Gurman was named the Chairman of the Council by the Governor shortly after the Executive Order was issued which designated the Missouri Law Enforcement Assistance Council as the State Planning Agency to administer and implement the provisions of the Juvenile Delinquency

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Prevention and Control Act of 1968. The minutes of the Council, all members of which were appointed by the Governor, indicate that Mr. Gurman's initial salary and allowances and his further increases in salary were determined by the Council.

In this respect our attention has been called to Attorney General's Opinion No. 465 dated December 29, 1966 to Lee E. Norbury, copy enclosed, and also in particular to the decisions of the Missouri Supreme Court in *Githens v. Butler County* 165 S.W.2d 650 (1942) and *Nodaway County v. Kidder* 129 S.W.2d 857 (1939). The holdings in these respective opinions, concisely stated, is that a member of an official board cannot contract with the body of which he is a member since such contract would be against public policy and that a member of a board cannot be appointed to a position by the board of which he is a member.

The facts before us disclose that the Governor himself made the appointment of Mr. Gurman to the Council and designated him Chairman. While, we are advised, his status in the law enforcement plan is designated as "Consultant", in this instance, as in others, it is not the title of the subject which governs but rather the substance. That is, even in a contested case parol evidence may be admissible to clarify the nature and extent of a commission. *State v. Adm'r of Fulkerson* 10Mo. 423 (1847). Therefore the question is not whether a council member can, in the sense of the above Missouri cases, contract with the Council but is simply whether the Council under these circumstances has the authority to fix the compensation and allowances of the Council Chairman.

Without attempting to pass upon any aspects of the law enforcement plan or the Law Enforcement Assistance Council which are not before us it appears clear that this council has the power and authority to set the compensation of the Chairman and that the exercise of such power is not against public policy. The council has power to set the compensation of officers and employees of the council and this includes the power to set the compensation of the chairman.

We view this action as comparable to the action of the members of a city council setting their salaries by ordinance passed by the council as authorized by a statute or city charter.

Honorable William L. Culver

CONCLUSION

It is the conclusion of this office that the Governor of Missouri properly established the Missouri Law Enforcement Assistance Council by Executive Order. Such Council may properly determine the compensation and allowances of the Chairman.

The foregoing opinion which I hereby approve was prepared by my assistant John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

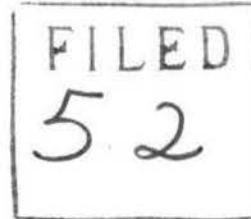
SUNDAY:
FIRE PROTECTION DISTRICTS:

The board of directors of a fire protection district may hold meetings and conduct its regular business and pass legally binding ordinances on Sunday.

OPINION NO. 52

March 1, 1972

Honorable Robert H. Branom
Representative, District 35
Room 407, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Branom:

This is in response to your request for an opinion from this office as follows:

"May the Board of Directors of a Fire Protection District hold its regular meetings, conduct its regular business, and pass legally binding ordinances on Sunday?

"The Board of Directors of a Fire Protection District wishes to hold its regular meetings on Sunday for the convenience of its members and the general public. However, one member of the Board has expressed the belief that actions taken and ordinances passed by the Board at a Sunday meeting would not be legal or binding."

The common law is the rule of action in this state unless it conflicts with the Constitution of the United States or of this state or is changed by statute in this state. Section 1.010, RSMo 1969.

In order to answer your question, we must first determine the scope and extent of Sunday laws.

In 83 C.J.S., Sunday, paragraph 4, it is stated:

"Although it has been said that the common law recognized the sanctity of the Lord's day, at common law the observance of Sunday is a duty of imperfect obligation; all prohibitions

Honorable Robert H. Branom

of ordinary business on the day come from statute, and, aside from judicial transactions, all acts not otherwise unlawful and not prohibited by statute may be lawfully done. The illegality of a given act must be determined by a statute forbidding it, and the courts will not extend the requirements of Sunday observance on considerations of public policy to prohibit acts which are not forbidden by statute."

In 83 C.J.S., Sunday, paragraph 6, it is stated:

"At common law all business other than judicial proceedings can lawfully be transacted on Sunday. However, the carrying on of one's business or occupation, or the transaction of business on Sunday, is specifically prohibited in many jurisdictions by statute, and municipal corporations may regulate the conduct of business on Sunday."

The principle of law, as announced in the preceding paragraphs, have been recognized by the courts of this state which have stated that at common law only judicial proceedings on Sunday were unlawful and that labor and the making of contracts were not prohibited unless by statute. *State v. Chicago, Burlington & Quincy Railroad Company*, 239 Mo. 196 (1912); *Said v. Stromberg*, 55 Mo.App. 438 (1893).

In *More v. Clymer*, 12 Mo.App. 11 (1892), the court stated, l.c. 19:

"In this country, the legislative power, since the formation of our federal government, has never extended to the enforcement of religious duties, merely because they are religious. The rules of human conduct prescribed by the Christian religion find no vindication in the civil authority, except in so far as they have become visibly incorporated in our constitutions and laws. To these constitutions and laws, then, and not to any mere sentiment of piety, however commendable, must we look for the means and measures whereby the courts are required to preserve the good order and well being of society. It may be sinful to make loans and promissory notes on Sunday. But if we do not find the acts clearly forbidden by

Honorable Robert H. Branom

the laws which we are authorized to enforce,
we must leave the sin to be dealt with by a
Higher Power. . . ."

By statute in this state, work and labor on Sunday, other than that of necessity or charity, was prohibited from 1814 until 1963 when Section 563.690 was repealed. 1 Territorial Laws 302. Under this statute contracts growing out of a violation were held void and unenforceable by the courts of this state, Glitzke v. Ginsberg, 258 S.W. 1004 (Mo. banc 1924).

When Section 563.690, RSMo, was repealed in 1963, Section 563.721, RSMo 1969, was enacted prohibiting the sale of certain goods and merchandise as stated therein from being sold on Sunday.

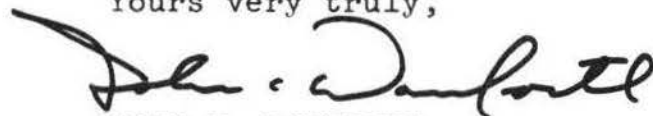
We are unable to find any statute at the present time which prohibits work or labor on Sunday or the transaction of business on Sunday.

CONCLUSION

It is the opinion of this office that the board of directors of a fire protection district may hold meetings and conduct its regular business and pass legally binding ordinances on Sunday.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

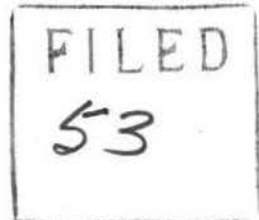
TAXATION (INTANGIBLE):
CORPORATIONS:

An account receivable held by a parent corporation evidencing an obligation of a subsidiary corporation, is intangible personal property as defined by Section 146.010, RSMo 1969. The proceeds received by the parent corporation constitute "yield" as that term is used in Section 146.010. Therefore, such parent corporation holding the legal or equitable title or beneficial interest in intangible personal property is subject to the property tax imposed by Chapter 146, RSMo.

OPINION NO. 53

February 2, 1972

Mr. James E. Schaffner
Director of Revenue
Department of Revenue
4th Floor Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Schaffner:

This official opinion is issued in response to your recent request concerning the applicability of the intangible personal property tax laws to certain inter-corporate transactions. In your request, you stated the following fact situation and question:

"A parent corporation advances money to a subsidiary corporation (separate corporate entity). The records of the parent corporation show an account receivable due from the subsidiary and the records of both corporations show an interest payment from the subsidiary to the parent on the funds advanced.

"QUESTION: Is this account receivable intangible personal property coming within the meaning of the definition contained in Section 146.010, para. 1, RSMo., 1969, and is the interest arising from this advance within the definition of yield contained in Section 146.010, para. 4, RSMo., 1969 and as such, subject to general Intangible Tax?"

The statutory provisions referred to in your question define intangible personal property to include notes, accounts receivable and real estate mortgages. Section 146.010.1, RSMo 1969. Yield

Mr. James E. Schaffner

is defined as the ". . . aggregate proceeds received as the result of ownership or beneficial interest in intangible property whether received in money, credits or property, . . ." Section 146.010.4, RSMo 1969.

By giving a literal interpretation to the language of the statute, it is clear that the terms intangible personal property and yield encompass an account receivable held by a parent corporation, indicating indebtedness on the part of a subsidiary. However, to render a complete answer to your question and therefore decide whether such an account receivable is subject to the intangible personal property tax, it is necessary to consider another subparagraph of Section 146.010.

Subparagraph 2 of 146.010, RSMo 1969, defines the term person as follows:

"The term 'person' includes any individual, firm, copartnership, joint adventure, association, corporation, company, estate, trust, business trust, syndicate, executor, administrator, receiver or trustee appointed by the state or federal court, or any other group or combination acting as a unit."
(Emphasis added).

An examination of this subparagraph is essential, because if the legislature intended that a parent and subsidiary to constitute "any other group or combination acting as a unit", they would not be subject to the intangible personal property tax because Section 146.030, RSMo 1969 imposes the tax on "persons".

In defining "person" the legislature attempted to enumerate every conceivable individual or group entity that might have the capacity to own or hold intangible personal property. The phrase "or any other group or combination acting as a unit" was included undoubtedly to bring any new form of property holding or ownership within the scope of the intangible personal property tax.

The use of the word "corporation" by the statutory provision also indicates that the legislature intended subsidiaries and parents to be regarded as distinct units. Indeed, the fact that they are so organized, as separate corporations, indicates that they are not unitary in nature or function.

Further support for the proposition that the legislature did not intend to equate parent and subsidiary corporations with combinations acting as a unit can be found in an examination of Section 143.100, RSMo 1969. In contrast to 146.010, RSMo 1969, Section 143.100, RSMo 1969 draws a distinction between parent and subsidiary corporations for income tax purposes. Subsection 6 of

Mr. James E. Schaffner

that statutory provision, in effect, permits the parent and subsidiary to act in a unitary manner in reporting dividends paid by the subsidiary to the parent. The absence of a similar provision in the intangible personal property tax chapter (Chapter 146) would indicate that the legislative intent was to regard a parent corporation and a subsidiary corporation as separate entities. Numerous decisions have emphasized the separate nature of parent and subsidiary corporations. Illustrative of this principle is the recent decision in Turpin v. Chicago, Burlington & Quincy Railroad Company, 403 S.W.2d 233 (Mo. banc 1966). In that case the plaintiff was a driver for Burlington Truck Lines, a wholly owned subsidiary of the defendant. The plaintiff alleged that this factor, among others, indicated that the subsidiary was but the alter ego of the parent. The court rejected this argument and found that the parent and subsidiary were indeed individual entities despite total ownership by the parent. The court observed that: "... mere ownership of all the stock of one corporation by another and the identity of officers of one with officers of another are not alone sufficient to create identity of corporate interests between the two . . ." (At 240 - quoting from Fawcett v. Missouri Pacific Railroad Company, 242 F.Supp. 675, 678, aff'd 347 F.2d 233 (5th Cir. 1965)). Eisenbarth v. Equity Mutual Insurance Company, 189 S.W.2d 168 (Mo.App. 1945) noted: "Interlocking directorates, close association of several corporations, and domination of them by a single officer are not sufficient to require disregard of separate entities." Accord, Blackwell Printing Company v. Blackwell-Wielandy Company, 440 S.W.2d 433 (Mo. 1969); Martin v. Development Company of America, 240 F.42 (9th Cir. 1917).

Similarly, the courts have held that a corporation is a separate entity from its shareholders, and is subject to taxation separate and apart from those shareholders. See, for example, United States v. General Bancshares Corp., 388 F.2d 184 (8th Cir. 1968); accord, Missouri Pacific Railroad Company v. Slayton, 407 F.2d 1078 (8th Cir. 1969), 18 C.J.S., Corporations, Section 4.

Therefore, parents of subsidiary corporations are not "any other group or combination acting as a unit", as that term is used in subparagraph 2 of Section 146.010, RSMo 1969. Interpretation of the relevant legislative enactments and judicial decisions indicates that they are to be considered separate entities for the purpose of application of the intangible personal property tax laws.

CONCLUSION

It is the conclusion of this office that an account receivable held by a parent corporation evidencing an obligation of a subsidiary corporation, is intangible personal property as defined by Section 146.010, RSMo 1969. The proceeds received by the parent

Mr. James E. Schaffner

corporation constitute "yield" as that term is used in Section 146.010. Therefore, such parent corporation holding the legal or equitable title or beneficial interest in intangible personal property is subject to the property tax imposed by Chapter 146, RSMo.

The foregoing opinion which I hereby approve was prepared by my assistant, Peter H. Ruger.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

*Note: See Hogan
v. Hayes, 139 SW₂ 875.
(1982)*

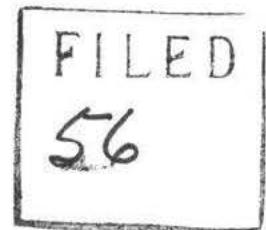
CHIROPRACTIC:

1. Under the provisions of Section 331.010, RSMo 1969, a chiropractor has authority to diagnose for the limited purpose of determining whether the particular treatment which he may legally render to a patient is proper treatment for the disease from which the patient is suffering. 2. A chiropractor is permitted to take and evaluate for diagnostic purposes only x-rays of the human spinal column and other parts of the human body for the limited purpose of determining whether the disease or ailment is one he can treat and to determine the proper treatment. 3. Section 331.010, RSMo 1969, prohibits chiropractors from employing any diagnostic tests or procedures which involve operative surgery or the administration or injection of any drug or medicine. Similarly proscribed are any procedures which are exclusively reserved to the fields of obstetrics, osteopathy, surgery or medicine.

OPINION NO. 56

September 12, 1972

Honorable J. H. Frappier
State Representative
2665 Sorrell Drive
Florissant, Missouri 63033



Dear Representative Frappier:

This is in response to your request for an official opinion from this office as follows:

"The practice of chiropractic is defined in Section 331.010, Missouri Revised Statutes as follows:

'The practice of chiropractic is defined to be the science and art of examining and adjusting by hand the movable articulations of the human spinal column, for the correction of the cause of abnormalities and deformities of the body. It shall not include the use of operative surgery, obstetrics, osteopathy, nor the administration or prescribing of any drug or medicine. The practice of chiropractic is declared not to be the practice of medicine and surgery or osteopathy within the meaning of chapter 334, RSMo, and not

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subject to the provisions of that chapter.'

"(1) Under the above statutory definition, does a chiropractor have broader authority for diagnostic purposes than for therapeutic purposes?

"(2) Under the above statutory definition, is a licensed chiropractor permitted to take and evaluate for diagnostic purposes an X-ray of the human spinal column?

"(3) Under the above statutory definition, is a licensed chiropractor permitted to take and evaluate X-rays of parts of the human body other than the spinal column, such as the abdomen, skull, chest, lungs, and extremities?

"(4) Under the above statutory definition, is a licensed chiropractor permitted to employ and evaluate the results thereof laboratory procedures and diagnostic tests normally employed by physicians and surgeons in the diagnosis of illness and disease? For example, which, if any, of the following laboratory procedures are permitted: (a) Urinalysis, (b) Angiocardiography, (c) Myelogram, (d) Blood Count, (e) Electrocardiogram, (f) Electroencephalogram, (g) Pap Test, (h) Basal Metabolic Rate, (i) Pulmonary Function Studies, (j) Ventriculogram, and (k) Sputum Test."

The statutory definition of the practice of chiropractic evidences a rather spare definitional statement followed by several direct pronouncements of what chiropractic does not include. This office has recently spoken regarding the limits of the chiropractic method of treatment (see Attorney General's Opinion No. 239 issued 10-19-70). It has been contended that the scope of chiropractic diagnosis is no broader than that of chiropractic treatment. The argument is advanced that as a chiropractor is limited in treatment to "... adjusting by hand movable articulations of the human spinal column." so he is limited in his diagnosis to "... examining ... by hand the movable articulations of the human spinal column." (Section 331.010, RSMo). Corollarly, it is contended that since a chiropractor is limited to examining and adjusting the human spinal column by hand, only abnormalities of the spine can be treated.

Honorable J. H. Frappier

Standard definitions of chiropractic reveal it to be a system of treatment of the tissues and bones or spinal column based on the belief that many of the body's disorders are caused by some impairment of the nerves of the vertebral structure (see Schmidt's Attorney's Dictionary of Medicine 1972 and Stedman's Medical Dictionary 1966). This definitional concept is rather concisely expressed by our statute defining the practice of chiropractic in Missouri. The chiropractor examines and adjusts the spine ". . . for the correction of the cause of abnormalities and deformities of the body." (Section 331.010, emphasis added).

Little is said regarding the scope of chiropractic diagnosis, but implicit in this definition is a need to discover the "abnormalities and deformities of the body" before proper treatment can be given. Other sections of Chapter 331 are helpful in evidencing legislative intent regarding the scope of chiropractic diagnosis. Section 331.030(4) requires that all applicants for licensure as chiropractors be examined in various subjects, among which are "anatomy," "physiology," "symptomatology," and "pathology." These terms have generally accepted meanings and the following definitions are taken from Dorland's Medical Dictionary, 24th Edition, 1965:

Anatomy - "concerned with the study of points connected within the diagnosis and situation of internal diseases."

Pathology - "That branch of medicine which treats of the essential nature of disease, especially of the structural and functional changes in tissues and organs of the body which cause or are caused by disease."

Physiology - "The science that treats the functions of the living organism and its parts."

Symptomatology - "That branch of medicine which treats of symptoms; the systematic discussion of symptoms; the combined symptoms of a disease."

These subjects, mandatory of state examination, evidence a legislative intent that chiropractors be competent in areas of

Honorable J. H. Frappier

medical science that directly relate to the diagnosis of abnormalities and deformities of the entire human body. For Section 331.010 must be read in pari materia with Section 331.030(4) as well as all other sections of Chapter 311. ". . . Effect must be given to all provisions. Apparent conflicts must be harmonized whenever possible. . . ." Bittiker v. State Board of Registration for the Healing Arts, 404 S.W.2d 402, 406 (K.C.Ct.App. 1966).

Section 331.030(2) further requires that chiropractic licensees have completed a minimum of four thousand class hours in instruction of four years in chiropractic college. Although the legislature was silent as to the allocation of class hours to specific courses of study, it is significant to set out excerpts from the course catalog of one of Missouri chiropractic colleges, Logan College of Chiropractic:

"Laboratory Diagnosis 206-256

Unit Credits: 3 Total Hours: 80 (Lecture
16 - Laboratory 64)

"206 (40 hours) A study of the general characteristics of urine and the indications of abnormal findings. Procedures for chemical examination and microscopic examination, and tests for pathological substances are taught and practiced in the laboratory.

"256 (40 hours) A lecture and laboratory course including a review of the elements of the blood and a study of coagulation, with instruction in procedures for a routine blood examination. This includes obtaining of specimens, physical measurements of hemoglobin, total cell counts of red and white corpuscles, a study of stained blood for differential determinations, and a consideration of special blood pathology." Logan College of Chiropractic, Catalog, pp. 53-54.

"Physical Diagnosis 200-250-300

Unit Credits: 7.50 Total Hours: 140 (Lecture
104 - Laboratory 36)

"200 (20 hours) A lecture and laboratory course in which the student is taught procedures for examination of the patient and recognition of the physical signs of illness and disease. In this section the student is instructed in history-taking and recording of the mental and emotional state of the patient in examination. Lectures involve the use of visual aids and there is an application of the

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procedures through group work in class, making up the laboratory portion of the course.

"250 (100 hours) Lecture and laboratory work of teaching the steps in performing a proper physical examination, which includes preparation of the patient and techniques for examination of mental status, posture, body movements, gait, speech, nutrition, stature, temperature, skin, head, face and neck, eyes, ears, nose and throat, thorax and lungs, breast, cardiovascular system, abdomen, and male genitalia, female genitalia, extremities, nervous system.

"300 (20 hours) Lecture and laboratory material presented in same general format as earlier sections of Physical Diagnosis. This section covers examination of the musculoskeletal system and presentation of some twenty-five orthopedic analytico-diagnostic tests, including Lewin, Goldthwait, Lesegue, Soto Hall, Fabere-Patrick, Laguerre and others." Logan College of Chiropractic, Catalog, p. 55.

"Clinical Diagnosis 305-350-400-450-501

Unit Credits: 23.75 Total Hours: 380

"305 (60 hours) A lecture course that covers the diseases according to the systems and organs of the body. The student is drilled in causes, symptoms, possible complications and diagnostic signs of the various diseases. Particular attention is paid to early recognition of the diseases to enable the practitioner to eliminate the causative factors as early as possible. This first section covers the cardiovascular system and blood and blood forming organs. Movies, slides, charts and graphs are used to better present the material to the student. When possible actual cases with history, x-rays and daily progress records are brought into class for discussion.

"350 (80 hours) Material is presented in same manner as in first section and specific areas covered are the kidney and the respiratory system.

"400 (80 hours) Same format of presentation as in earlier sections with specific coverage of digestive system, liver and endocrine glands.

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"450 (120 hours) This section covers diseases of the locomotor system and the nervous system.

"501 (40 hours) A discussion-type lecture course designed to correlate the information presented throughout the Clinical Diagnosis course with the other basic science courses taken. This provides an opportunity for a greater integration of knowledge and a better understanding. Anatomy, physiology, chemistry, pathology and bacteriology are brought into the discussion and chiropractic philosophy and technique are related as well." Logan College of Chiropractic, Catalog, pp. 55-56.

"X-ray Interpretation and Diagnosis 255-307-356
Unit Credits: 11.5 Total Hours: 200 (Lecture
168 - Laboratory 32)

"255 (40 hours) A lecture and laboratory course of study in specialized methods of marking x-rays to determine the absolute relationship of the bones of the spinal column and pelvis, utilizing their measurements. The first section covers full-spine x-ray marking, anterior to posterior view. Second section covers lateral full-spine marking. Third section covers marking of the cervical vertebrae, AP and lateral. Fourth section is a study of lateral lumbar marking. The fifth section is devoted entirely to practical application of the marking methods with students marking films.

"307 (80 hours) This is a course in spinal x-ray interpretation designed to acquaint the student with both normal and abnormal spinal alignment, position and structure. Through viewing numerous x-rays, the student becomes familiar with the normal structural relationship of the individual segments. The ten basic distortions are viewed and studied individually on film. There are question and answer sessions and discussions on x-ray films of class members and clinic patients.

"356 (80 hours) A course in x-ray interpretation covering pathology found in various parts of the body. X-ray films and slides are used to familiarize the student with those conditions to be noted on film. The first section deals with bone pathology, including

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fractures, diseases of the bone, anomalies and arthritis. The second section, on the chest, includes a review of the normal respiratory system and pathology of the respiratory organs. The gastrointestinal tract is covered, including the esophagus, stomach, small intestine and colon, the biliary tract, the urinary tract. The last section covers special examinations and procedures. X-ray films and slides are used in the presentation of the material along with the illustrations in the text." Logan College of Chiropractic, Catalog, pp. 60-61.

Obviously, a chiropractor is not authorized to practice anything and everything he has been taught in chiropractic college (see Colorado Chiropractic Association v. State, 467 P.2d 795 (Colo. banc 1970); Crees v. California State Board of Medical Examiners, 28 Cal.Rptr. 621 (Cal.App. 1963)), but it does indicate that a significant part of the Missouri chiropractic training has been spent in diagnostic theory and techniques.

In addition to the above cited sections of Chapter 331, Section 331.040 imposes certain affirmative duties on chiropractors which contemplate a scope of diagnosis broader than a mere manual examination of the spine:

"Chiropractic practitioners shall be subject to the state and municipal regulations relating to the control of contagious diseases, the reporting and certifying of deaths, and all matters pertaining to public health, and such reports shall be accepted by the officer or department to whom such report is made."

Case law in Missouri and other states is helpful to demonstrate that the courts have placed on chiropractors a legal duty not only to diagnose but to do so skillfully. In a Missouri malpractice case against a chiropractor the Springfield Court of Appeals upheld a judgment against the chiropractor for malpractice and noted:

". . . he did not make much of a physical examination, took no X-rays, or diagnosed her case in any manner except by feeling of and manipulating her vertebrae with his fingers. . . ." York v. Daniels, 259 S.W.2d 109, 120 (Spr.Ct.App. 1953)

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The Missouri court in the Daniels case quoted with approval the Montana decision of Bakewell v. Kahle, 232 P.2d 127, 129 where the court stated:

"From the evidence before them, the jury could find: That defendant made a wrong diagnosis or analysis of plaintiff's condition, and that her stiff neck, headaches and sore spot behind the right ear were not due to vertebrae out of place; that there were no vertebrae out of place and the x-ray picture, taken by defendant, so showed; and that defendant should have given plaintiff no adjustment.

"The jury could also find: That during the April 8th adjustment, after plaintiff directed defendant to stop, defendant continued adjustment and manipulation with his hands and caused a rupture of a brain tumor, resulting in injury to plaintiff."

The court in the Bakewell case held that since chiropractors were members of the healing arts, the obligation to make a "skillful and careful diagnosis of the ailment of a patient" applied to chiropractors.

The Supreme Court of Ohio in Willetts v. Rowekamp, 16 N.E.2d 457 (Ohio 1938) found sufficient negligence on the part of a chiropractor when proper diagnostic techniques would have revealed a sacroiliac dislocation. The court stated at page 459:

". . . there is some evidence that the failure to use X-ray resulted in an erroneous diagnosis, and evidence in the record indicates that the use of X-ray is required, it being difficult to diagnose such subluxation or dislocation without the employment of X-ray. . . . Diagnosis must be regarded as important as is the treatment to be administered, for faulty diagnosis may result in treatment which is not only correctional and curative, but is positively harmful in character."

Other jurisdictions have affirmed similar malpractice judgments against chiropractors for failure to diagnose diphtheria in a patient, Janssen v. Mulder, 205 N.W. 159 (Mich. 1925), and tubercular meningitis, Abos v. Martyn, 88 P.2d 797 (Cal. 1939).

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What then is the legal scope of chiropractic diagnosis? Undoubtedly, it is absurd to construe Section 331.010 as strictly limiting a chiropractor to examination of the human spinal column by hand only (presumably, such examination would have to be conducted blindfolded); furthermore, malpractice case law requires a chiropractor to do much more than a manual examination of the spine in his diagnostic approach. The answer then to your first question is yes, a chiropractor does have somewhat broader authority for diagnostic purposes than for therapeutic purposes.

Does this mean that a chiropractor has authority and facility to diagnose generally as does a physician? Clearly not. Many diagnoses are necessarily forbidden to the chiropractor by the effect of the strict statutory proscription against the use of operative surgery and the administration of any kind of drug or medicine. If a general rule regarding the scope of chiropractic diagnoses were to be stated, this office is persuaded by the approach taken by the Superior Court of Pennsylvania in Howe v. Smith, 199 A.2d 521, 524 (Pa. 1964):

"Of course, chiropractors may and must diagnose before they treat. However, in their argument here they have failed to recognize the obvious distinction between the authority to diagnose generally and the authority to diagnose for the limited purpose of determining whether the particular treatment which they may legally render to a patient is proper treatment for the disease from which the patient is suffering."

Your second and third questions concern the use of x-ray by chiropractors. Chapter 331, the Chiropractic Law, is silent regarding the use of x-ray by chiropractors for diagnostic purposes. X-ray, we note, is not operative surgery, obstetrics, or osteopathy, nor does it involve the administration or prescription of any drug or medicine. Chapter 334, RSMo 1969, the Physicians and Surgeons Law, is similarly silent on the subject of x-ray. Nowhere is the use of x-ray for diagnosis reserved exclusively to the practice of medicine. Case law in Missouri and other states reveals nothing which would prevent chiropractors from using x-ray as a diagnostic technique. In fact, the Springfield Court of Appeals in York v. Daniels, *supra*, found reason to affirm a malpractice judgment against a chiropractor because he had not taken x-rays.

Other jurisdictions have found that x-ray is not a field exclusively reserved to medical doctors. In Dorr, Gray & Johnston v. Headstream, 295 S.W. 16, 17 (Ark. 1927) the Supreme Court of

Honorable J. H. Frappier

Arkansas held that a chiropractor was competent to testify as an expert witness on x-ray in a malpractice suit against a physician:

" . . . The X-ray is largely a scientific field unto itself, and any one who by study, observation, and experience in that particular branch of science possesses knowledge and skill therein beyond that of persons of common knowledge is competent to testify as an expert witness. (citations omitted)

"This court is committed to the doctrine that it is not necessary for one to be a physician in order to be an X-ray specialist and entitle him to testify as an expert. . . ."

The Arkansas court quoted with approval the holding of the Supreme Court of Minnesota in an earlier case involving x-ray:

" . . . The so-called X-rays, discovered by Roentgen, have been recognized and known to scientists, both in and out of the medical profession, for some eight years. During this time the apparatus for the generation of the X-rays, together with the flouroscope, has been used very generally by electricians, professors of physics, skiagraphers, physicians, and others, for experimental and demonstrative purposes. It is a scientific and mechanical appliance, the operation of which is the same in the hands of the college professor, or the physician of the allopathic, homeopathic, or any other school of medicine. It may be applied by any person possessing the requisite scientific knowledge of its properties, and there would seem to be no reason why its application to the human body may not be explained by any person who understands it. . . ." Henslin v. Wheaton, 97 N.W. 882, 883 (Minn. 1904)

The use of x-ray as a diagnostic tool by chiropractors was the subject of Attorney General Opinion No. 32 issued March 10, 1953 (see enclosed). This opinion held that a chiropractor may use x-ray to take and interpret x-ray pictures as an aid in diagnosis. We believe that a chiropractor may use x-ray as a diagnostic technique for the limited purpose of determining whether the treatment which he may legally render to a patient is the proper treatment

Honorable J. H. Frappier

for the ailment from which the patient is suffering. Thus, the answer to your second and third questions is yes.

Your fourth question regarding the specific laboratory procedures and diagnostic tests is more troublesome. It is very difficult to ascertain from either Chapter 331 or 334, RSMo 1969, which of these specific diagnostic tests are permitted to chiropractors and which are not. Certainly, any tests or procedures which involve operative surgery or the administration or injection of any drug or medicine are clearly prohibited. Similarly proscribed are any procedures which are exclusively reserved to the fields of obstetrics, osteopathy, surgery or medicine. It would be extremely difficult for this office with its limited information to pass judgment on each of these tests; more properly, it is the job for the courts and the legislature. We do note, however, that the rules and regulations of the Missouri Board of Chiropractic state that chiropractors are not considered qualified to employ many diagnostic procedures, three of which are ones listed in the opinion request: angiocardiology, myelogram and ventriculogram. Regulation No. 30, Rules and Regulations of the Missouri Board of Chiropractic on file with the Secretary of State. In noting the above procedures proscribed by the Board, this office does not thereby intend to pass judgment on those procedures permitted by Regulation No. 30.

CONCLUSION

The opinion of this office is as follows:

1. Under the provisions of Section 331.010, RSMo 1969, a chiropractor has authority to diagnose for the limited purpose of determining whether the particular treatment which he may legally render to a patient is proper treatment for the disease from which the patient is suffering.

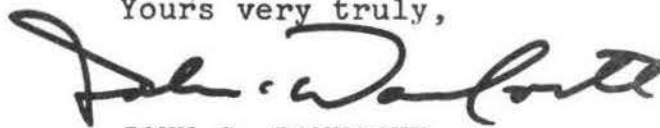
2. A chiropractor is permitted to take and evaluate for diagnostic purposes only x-rays of the human spinal column and other parts of the human body for the limited purpose of determining whether the disease or ailment is one he can treat and to determine the proper treatment.

3. Section 331.010, RSMo 1969, prohibits chiropractors from employing any diagnostic tests or procedures which involve operative surgery or the administration or injection of any drug or medicine. Similarly proscribed are any procedures which are exclusively reserved to the fields of obstetrics, osteopathy, surgery or medicine.

Honorable J. H. Frappier

The foregoing opinion, which I hereby approve, was prepared by my assistant, Leland B. Curtis.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

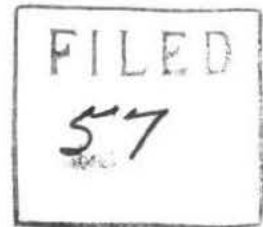
JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 32
3-10-53, Geekie

Op. No. 239
11-10-70, Holt

April 17, 1972

OPINION LETTER NO. 57
Answer by letter-Klaffenbach



Honorable Donald L. Manford
State Senator, District 8
Room 425, Capitol Building
Jefferson City, Missouri 65101

Dear Senator Manford:

This letter is in answer to your question in which you ask:

"Do Municipal Judges of municipalities having a constitutional charter have the authority to issue bench paroles to defendants before their courts relative to cases involving violation of municipal ordinances?"

We assume from the further text of your correspondence that you refer to Kansas City or Independence since these are the only constitutional charter cities in your district.

Inasmuch as this office does not normally construe charter provisions, we directed your inquiry to the Office of the City Counselor of Kansas City and herewith attach his reply which we believe answers your question with respect to Kansas City. We also enclose a copy of Section 22.22 of the city ordinances of Kansas City.

We also call your attention to Section 4.2 of the Independence charter providing in part as follows:

Honorable Donald L. Manford

"The municipal judge shall, upon convictions, fix the amount of fine or imprisonment, or both, and costs within the limits prescribed by the charter or ordinance, and shall have power to grant stays of execution and bench paroles, to suspend sentence, and to place defendants on probation."

We are also enclosing for your information Opinion Nos. 213 and 252 issued October 27, 1971, to James G. Baker and Robert B. Paden.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures

RESIDENCE:
FIRE PROTECTION DISTRICTS:

A fire protection district may enact a rule or regulation requiring all future firemen to reside within the fire protection district.

OPINION NO. 60

May 1, 1972

Honorable Earl L. Schlef
Representative, District 28
Room 404, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Schlef:

This is in response to your request for an opinion from this office as follows:

"May the Board of Directors of a Fire Protection District operating in St. Louis County, pursuant to Chapter 321 of the Revised Statutes of Missouri, enact Rules and Regulations, which would provide that all future firemen engaged by the District shall be residents of the District."

Section 321.220, RSMo 1969, defines the powers of the fire protection board and provides in part as follows:

"For the purpose of providing fire protection to the property within the district, the district, and on its behalf the board, shall have the following powers, authority and privileges:

"(9) To hire and retain agents, employees, engineers and attorneys, including part-time or volunteer firemen,

* * *

"(12) To adopt and amend bylaws, fire protection and fire prevention ordinances, and any other rules and regulations not in conflict with the constitution and laws of this state, necessary for the carrying on of the business, objects and affairs of the board and of the district, and refer to the proper authorities for prosecution any infraction thereof detrimental to the district. . . ."

Honorable Earl L. Schlef

A fire protection board is given express authority to hire and retain the necessary employees for the performance of the duties of the fire protection district. Such employees are public employees, and your question concerns the right and authority of the fire protection board to make rules and regulations as to their qualifications.

In *State ex inf. McKittrick ex rel. Ham v. Kirby*, 163 S.W.2d 990 (Mo. banc 1942), the issue before the court was the validity of certain provisions of the charter of the City of St. Louis governing civil service employees. Some of the charter provisions complained of were those exempting employees at the time of the enactment of the charter from the provisions of the charter, exempting certain classes of employees from its provisions who were employees at the time of the enactment of the charter provision, and prohibiting political activity of the employees under the Civil Service Act. In discussing the rights of an individual in obtaining public employment, the court stated l.c. 995-996:

"Relator also contends that the above cited provisions of the amendment are violative of the due process of law clause of the 14th Amendment to the Constitution of the United States. It has been uniformly held that a public office is not property in the constitutional sense and that the right to be appointed to a public office is not a natural or property right within the protection of the due process clause. *State ex rel. v. Davis*, 44 Mo. 129; *State ex inf. Crow v. Evans*, 166 Mo. 347, 66 S.W. 355; *State ex rel. v. Kansas City*, 310 Mo. 542, 276 S.W. 389; *Motley v. Callaway County*, 347 Mo. 1018, 149 S.W.2d 875; *People v. Evans*, 247 Ill. 547, 93 N.E. 388; *Crampton v. O'Mara*, 193 Ind. 551, 139 N.E. 360.

* * *

"Relator further attacks these provisions on the ground that they constitute an interference with freedom of speech as guaranteed to the citizens of this state by § 14 of Art. II of the Missouri Constitution and the due process clause of the 14th Amendment to the Constitution of the United States. A sufficient answer to this contention, as well as to all of relator's contentions in regard to these political restrictions, is found in the language

Honorable Earl L. Schlef

of the late lamented Justice Holmes in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517: 'The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control.'

It is our opinion no person has a constitutional right to be employed or appointed as a fireman; and, if employed or appointed, he is subject to such reasonable rules and regulations regarding his employment and tenure of employment as the fire district may promulgate regarding residency of firemen.

The statute concerning fire protection districts is silent insofar as the question of residency of the employee is concerned. The legislature has seen fit by statute in many instances to require municipal employees of certain cities to be residents of the city. Certain officers and employees of fourth class cities are required to be residents of the city under Section 79.250, RSMo 1969. Certain officers and employees of a third class city are required to be residents of the city under Section 77.380, RSMo 1969. In *State ex rel. Reardon v. Mueller*, 388 S.W.2d 53 (St.L.Ct.App. 1965), the court held that a residency requirement imposed by the charter of the City of St. Louis requiring a city alderman to be a resident of his ward was a valid requirement and mandatory. These statutes would not be valid if the residency requirement violated any constitutional right of an individual regarding his employment.

Since there is no statute requiring employees of a fire protection district to be residents of the district, the question remains as to whether the board of directors of the fire protection district has the authority to require all future employees of the fire protection district to be residents of the district and do so by regulation. It is our opinion that the board of directors may require firemen employed by them in the future to reside within the district.

In regard to whether the board may by a regulation require all future employees of the fire protection district to be residents of the district, it is our opinion that they may do so.

Honorable Earl L. Schlef

In 73 C.J.S., Public Administrative Bodies and Procedure, paragraph 95, page 416, the general rule of law is stated as follows:

"A public administrative officer ordinarily has authority to make or promulgate such rules and regulations as may aid in enforcing or carrying into effect the law or statute which he is administering. The measure of his power it [sic] the amount adequate for the purpose for which it was delegated, and his discretion in promulgating regulations depends, to some extent, on the subject matter of the legislation which he is attempting to implement. In exercising his power to make or adopt rules and regulations a public administrative officer should not go beyond the authority vested in him, nor may he regulate matters expressly taken or removed from his supervision by the legislature. He may make or adopt only rules and regulations which will carry into effect the will of the legislature as expressed by the statute, and he may not enact a law under the guise of making an administrative rule or regulation."

Under the above-quoted statute, a fire protection district has express authority to hire and retain necessary employees for the performance and carrying out of the business of the fire protection district. It is also given authority by statute to adopt any necessary rules and regulations necessary for the carrying on of the business, objects and affairs of the district. We believe that a rule and regulation requiring all future employees to live within the fire protection district does not infringe upon any fundamental constitutional right of an individual to live where he wishes to live or any other fundamental right in regard to public employment, and we consider such a rule as a reasonable, valid regulation.

CONCLUSION

It is the opinion of this office that a fire protection district may enact a rule or regulation requiring all future firemen to reside within the fire protection district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Very truly yours,



JOHN C. DANFORTH
Attorney General

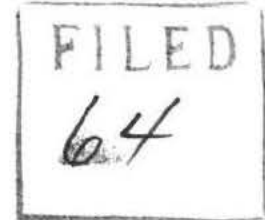
STATE TREASURER:
LAND RECLAMATION COMMISSION:

The attached trust agreement between the State Treasurer and the Missouri Land Reclamation Commission covering moneys received by the Commission which are required as bond by Sections 444.772 and 444.778, RSMo Supp. 1971, is not in violation of Section 13 or 15 of Article IV, Constitution of Missouri.

OPINION NO. 64

June 7, 1972

Mr. Robert Neuenschwander, Director
Land Reclamation Department
Room 36B, Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Neuenschwander:

This is in answer to your request for an official opinion of this office concerning the validity of a trust agreement between the State Treasurer and the Missouri Land Reclamation Commission covering moneys received by the Commission which are required as bond by Sections 444.772 and 444.778, RSMo Supp. 1971.

Section 444.772 provides that all persons engaging in the surface mining of clay, limestone, sand and gravel must obtain a permit. As a condition for a permit, the applicant must file a penal bond "conditioned upon the faithful performance of the requirements set forth in sections 444.760 to 444.786 and of the rules and regulations of the commission."

Section 444.778 provides in part as follows:

" . . . The bond shall be signed by the operator as principal, and by a good and sufficient corporate surety, licensed to do business in this state as surety. . . . In lieu of a bond, the operator may deposit cash or securities with the commission in an amount equal to that of the required surety bond on conditions as above prescribed.

"2. The bond or security shall remain in effect until the mined acreages have been reclaimed, approved and released by the commission.

* * *

Mr. Robert Neuenschwander

"6. The commission shall have the power to reclaim, in keeping with the provisions of sections 444.760 to 444.786, any affected land with respect to which a bond has been forfeited.

"7. Whenever an operator shall have completed all requirements under the provisions of sections 444.760 to 444.786 as to any affected land, he shall notify the commission thereof. If the commission determines that the operator has completed the requirements, the commission shall release the operator from further obligations regarding the affected land and the penalty of the bond shall be reduced proportionately."

It is clear that an operator, in lieu of bond, has the right to deposit cash with the Commission. The purpose of the bond is to insure compliance with the land reclamation requirements of the law. If the operator fails to meet the land reclamation requirements, the bond can then be forfeited. Section 444.782, RSMo Supp. 1971.

Such forfeited bond money is then put in the Mined Land Reclamation Fund, the purpose of which is to use the money to reclaim the land for which the bond was forfeited. Sections 444.780 and 444.784, RSMo Supp. 1971.

The question asked is whether a certain trust agreement is a proper way to handle and keep the cash money in lieu of bond until such time as either there is a forfeiture or the money is returned to the operator.

The method proposed is a trust agreement (copy attached) between William E. Robinson, State Treasurer, and the Land Reclamation Commission. However, before discussing the terms of the agreement, it is necessary to discuss an executive order of Governor Warren E. Hearnes (copy attached) which order purports to establish the "Mined Land Reclamation and Conservation Trust Fund for the purpose of receiving and disbursing bond moneys which are payable to the Land Reclamation Commission."

The order then designates that "The Honorable William E. Robinson, Treasurer of the State of Missouri, shall be trustee of such fund," and that "moneys from the fund shall be disbursed by William E. Robinson upon requisition by the Land Reclamation Commission approved by the Comptroller of the State of Missouri."

The trust agreement, after stating the reason for the agreement and after acknowledging the executive order, then: in paragraph (1) establishes the fund; in paragraph (2) designates William

Mr. Robert Neuenschwander

E. Robinson, Treasurer of the State of Missouri, as custodian and trustee of the fund; in paragraph (3) provides for the custodian and trustee to make disbursements from the fund upon requisition by the Land Reclamation Commission, and upon approval by the State Comptroller; in paragraph (4) states that the trustee shall keep all moneys delivered for deposit in the trust fund and shall disburse only as provided in the trust agreement, shall keep complete and accurate records which are available to the State Comptroller and are to be audited by the State Auditor; in paragraph (5) that the agreement is in effect so long as needed in connection with moneys received for bonding purposes; and in paragraph (6) that if William E. Robinson ceases to be State Treasurer he shall cease to be custodian and trustee and deliver the fund to the successor State Treasurer who shall automatically become trustee of the fund.

It is not our duty, nor would it be proper, for this office to address itself on whether this arrangement is the preferable way to handle these cash bond moneys. See Petition of Board of Public Buildings, 363 S.W.2d 598, 608 (Mo. banc 1962). The question of whether this trust agreement is proper or valid is not whether it should necessarily be done this way but whether there is any constitutional provision or law prohibiting this specific trust agreement.

Since the trust agreement, as established by executive order of the Governor, purports to give duties to the State Treasurer and the State Auditor, the question narrows to whether or not the agreement is prohibited by Section 13 or Section 15 of Article IV of the Constitution of Missouri.

The pertinent language which prescribes the duties of the State Auditor, Section 13, reads as follows:

" . . . No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds."

The pertinent language of Section 15, which pertains to the State Treasurer, reads as follows:

" . . . No duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds."

There is no similar constitutional provision relating to the State Comptroller. The duties of the Comptroller are prescribed by Section 33.060, RSMo, which reads:

Mr. Robert Neuenschwander

"The Comptroller shall keep the general accounting books of the state, and be the keeper of all public account books, accounts, vouchers, documents, and all papers relating to the accounts and contracts of the state, and its revenue, debt and fiscal affairs, including an account of all moneys received by the state from any source and of every separate fund in the treasury authorized by law."

It is apparent that if the trust agreement is valid under the constitutional provisions relating to the Auditor and Treasurer then it would also be valid as to the Comptroller.

First, we note that the constitutional prohibitions in both Sections 13 and 15 are against imposing duties by law with no specific reference to executive order which seems to be the case here. However, it is unnecessary to determine whether the executive order has the effect of law or is an attempt to circumvent the Constitution, or whether because of the executive order, the constitutional provisions are not applicable. This is because even if the executive order is invalid there would still be the question of whether the trust agreement standing on its own is valid, having been entered into by the named state officers.

In other words, even if the executive order was invalid, the question would remain as to whether these officers would be prohibited from entering into such a trust agreement.

In Petition of Board of Public Buildings, supra, the State Treasurer purportedly was imposed with the duty by resolution of a state agency as custodian of certain funds. The court stated, 1.c. 363 S.W.2d 598, 608:

" . . . The statutes in question do not provide that the State Treasurer shall be the custodian; in fact, they are silent as to the custody. The law has not imposed this duty on the Treasurer; and the prohibition runs against the legislature. There has certainly been no express violation of § 15, Art. 4 of the Constitution. There was no similar provision in the 1875 Constitution, and the background of the 1945 provision lies in the prior history of a building up of the power and patronage of elected officials by giving to them new functions and duties. . . . We hold, upon the interpretation stated above, that by the present proposal the essential and substantive duties of the Treasurer are not altered or extended."

Mr. Robert Neuenschwander

Therefore, it is our opinion that the trust agreement is not violative of either Section 13 or 15 as duties imposed by "law."

CONCLUSION

For the foregoing reasons, it is the opinion of this office that the attached trust agreement between the State Treasurer and the Missouri Land Reclamation Commission covering moneys received by the Commission which are required as bond by Sections 444.772 and 444.778, RSMo Supp. 1971, is not in violation of Section 13 or 15 of Article IV, Constitution of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Attachments

ELECTIONS:
REGISTRATION:
COUNTY CLERKS:

Section 51.121, RSMo 1969, requiring the county clerk to inspect voting precincts and present a report to the county court and certain party

officials is not applicable to counties in which there is registration under either Chapters 114 or 116, RSMo 1969 but in which there is not registration as provided for by both chapters.

OPINION NO. 66

March 27, 1972

Honorable Harold L. Volkmer
State Representative, District 100
Room 407 Capitol Building
Jefferson City, Missouri 65101



Dear Representative Volkmer:

You recently inquired whether the duties imposed on county clerks by Section 51.121, RSMo 1969, are applicable in counties in which there is local option registration, pursuant to Chapter 114, RSMo 1969, but no city registration, as authorized by Chapter 116, RSMo 1969, or in counties in which there is city registration but no local option registration.

Section 51.121, RSMo 1969 states:

"In counties of the second, third, and fourth classes, which have adopted the provisions of chapters 114 and 116, RSMo, the county clerk shall annually, on or before May tenth, inspect all voting precincts in the county, review the described boundary lines, and survey the number of voters in each precinct measured by the vote at the last preceding presidential election, and within thirty days after the conclusion of such inspection, present a signed report to the county court and the county chairmen of the two political parties receiving the largest number of votes in the last presidential election, detailing changes, alterations, and additions which appear to be necessary for the convenience of the voters."
(Emphasis added).

In determining the answers to the previously stated questions, the critical inquiry must be directed to the terms "Chapters 114

Honorable Harold L. Volkmer

and 116". The use of the term "and" connotes a legislative intent to require both conditions, the presence of the form of voter registration specified by both Chapters 114 and 116, to exist before this provision imposes any additional duties upon the county clerk.

The use of the term "adopt" by Section 51.121 with reference to Chapter 116 is incorrect because counties of the second, third, and fourth classes cannot adopt Chapter 116. The provisions of Chapter 116 are applicable only to voters in certain cities. It appears that the legislature meant that Section 51.121 should apply to counties which have voted to require a registration of the qualified voters in the county and in which the provisions of Chapter 116 are also applicable and in effect.

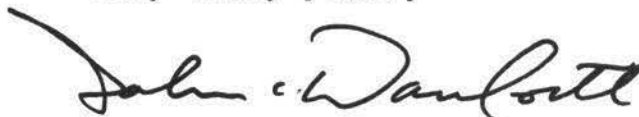
Both Chapters 114 and 116 impose certain specific duties upon a county clerk. Of course, when either of these chapters are applicable, the duties stated therein must be performed by the county clerk. However, because Section 51.121, RSMo 1969, states that both Chapters 114 and 116 must be in effect before the county clerk performs the duties required by that section, the county clerk is not required to perform such duties in counties which have registration pursuant to Chapter 114 or 116, RSMo 1969 but do not have registration under both chapters.

CONCLUSION

It is the opinion of this office that Section 51.121, RSMo 1969, requiring the county clerk to inspect voting precincts and present a report to the county court and certain party officials is not applicable to counties in which there is registration under either Chapters 114 or 116, RSMo 1969 but in which there is not registration as provided for by both chapters.

The foregoing opinion which I hereby approve was prepared by my assistant, Peter H. Ruger.

Very truly yours,

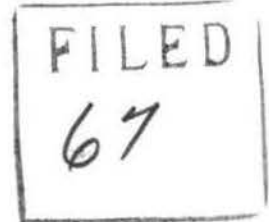
A handwritten signature in dark ink, appearing to read "John C. Danforth", with a stylized, flowing script.

JOHN C. DANFORTH
Attorney General

June 8, 1972

OPINION LETTER NO. 67
Answer by Letter - Klaffenbach

Dr. Arthur L. Mallory
Commissioner of Education
Department of Education
Post Office Box 480
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This letter is in response to your opinion request in which you ask the following question:

"Does the State Board of Education have the authority to purchase liability insurance to protect bus drivers employed to drive state-owned vehicles that are used to provide transportation for those participating in the trainable mentally retarded children's program authorized by Sections 178.190 through 178.250, RSMo?"

Your question refers to bus drivers employed by the state and we therefore presume that you are referring to such drivers who are employed by the State Board of Education in the discharge of its duties under the provisions of Sections 178.190, RSMo 1969 et seq.

In our view the question is resolved by our Opinion No. 93, dated September 9, 1969, to Cason, copy enclosed, and the answer is therefore that the board of education has the authority to purchase such liability insurance as a part of the compensation of such employees.

Very truly yours,

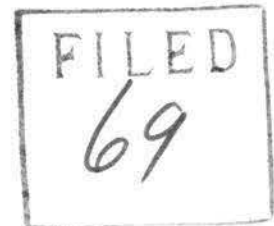
JOHN C. DANFORTH
Attorney General

Enclosure

May 18, 1972

OPINION LETTER NO. 69
Answer by letter-Almstedt

Honorable E. Richard Webber
Prosecuting Attorney
Scotland County
110 West Monroe Street
Memphis, Missouri 63555



Dear Mr. Webber:

This letter is in response to your opinion request on the following submitted question:

"Shall the Probate Court assess inheritance tax on not-for-profit cemetery associations, wherein the cemetery association is given a bequest in a will?"

The Missouri legislature has required by Section 145.020, RSMo 1969, that a tax be ". . . imposed upon the transfer of any property, . . . to persons, institutions, associations or corporations, . . ." unless such transfer falls without the prescriptions of that section or is exempt from taxation. The laws of Missouri exempt from inheritance tax such transfers which are ". . . used solely for . . . charitable . . . purposes in this state." (Section 145.090(1), RSMo 1969) or "[w]hen any property, benefit or income shall pass to or for the use of any . . . charitable purpose in this state, or to any . . . association, . . . in this state to be held and used . . . exclusively for . . . charitable uses and purposes, . . ." (Section 145.100(1), RSMo 1969).

The Missouri Supreme Court in the case of Catron v. Scarritt Collegiate Institute, 175 S.W. 571, 573 (Mo. banc 1915) quoted with approval from 5 Ruling Case Law 291 where a charity was defined as follows:

"Probably the most comprehensive and carefully drawn definition of a charity that has

Honorable E. Richard Webber

ever been formulated is that it is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. . . ."

The above work referred to in Catron further elaborated on the "public charity" definition by stating that,

"[a] gift is a 'public' charity when there is a benefit to be conferred upon the public at large, or some portion thereof, or upon an indefinite class of persons. . . ." 5 Ruling Case Law at 293

The Missouri courts have, to date, consistently followed the definition of public charity as above set forth.

In Newton v. Newton Burial Park, 34 S.W.2d 118 (Mo. 1930), the court found that a bequest for the purpose of "beautifying, ornamenting and maintaining the cemetery" fell within the definition of "charitable trust" or "public charity" (Newton, supra at 121). In Garlock v. Ladies Cemetery Association, 317 S.W.2d 432 (Mo. 1958), the court determined that the defendant association was organized under the Illinois not-for-profit association laws and had authority to do business in Missouri. One of the contentions raised on appeal was that while the defendant association was a not-for-profit organization, it was not a public charity. The court determined that the association was amenable to Illinois law and under the latter law ". . . all income received is [to be] devoted to the discharge of [the cemeteries] . . . public functions. . . ." and that the defendant association was therefore a public charity (Garlock, supra at 436-437).

Is a not-for-profit cemetery association a charitable entity within the above definition, thereby concluding that testamentary bequests to such entities are deemed to be either for charitable purposes or to a charitable institution and within the exemptions from inheritance tax transfer of Sections 145.090 and 145.100, RSMo 1969? This opinion answers the question affirmatively. However, in answering your request, I proceeded from the assumption that the cemetery association receiving the bequest engages in that activity only and engages in no other activities of an income producing nature.

Honorable E. Richard Webber

For your information, in Opinion No. 57, 1955, this office ruled that property or money transferred to a trustee for the purpose of beautification and care of the graves of the testator and his wife is subject to the Missouri inheritance tax. The conclusion in that opinion was compelled by the fact that the bequest was for the benefit of an individual. In this case, as we understand the facts, the cemetery association receives the bequest without any direction to use the bequest for any individual's benefit.

It is the opinion of this office that a cemetery association duly qualified as such under Chapters 352 or 355, RSMo 1969, and operating exclusively as such an entity, exists for a charitable purpose. Therefore, any testamentary transfer to it is exempt from the assessment of inheritance tax pursuant to Sections 145.090 and 145.100, RSMo 1969.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 57
1-6-55, May

CITIES, TOWNS & VILLAGES:
CITY COLLECTOR:
ELECTIONS:

A third class city with the Mayor-council form of government cannot abolish the office of collector and appoint a member of the city clerical staff or any other person to collect the city's taxes. Under Section 77.370, RSMo 1969, a third class city with Mayor-council form of government can abolish by ordinance the office of city collector only when the city contracts for the collection of taxes by the county collector or township collector.

OPINION NO. 70

March 8, 1972

Honorable A. Basey Vanlandingham
Missouri Senate, District 19
Room 333 Capitol Building
Jefferson City, Missouri 65101



Dear Senator Vanlandingham:

This opinion has been prepared in response to your recent request. The question you presented in that request was:

"May the City of Fulton, Missouri, a city of the third class, under the 4-year Mayor-Council form of government, abolish the office of City Collector and appoint a member of the City clerical staff as a collector or any other qualified person, to collect the City's taxes?"

The office of collector in a third class city under the Mayor-council form of government is established by Section 77.370, RSMo 1969. The revelant portions of that statute state:

"Except as hereinafter provided, the following officers shall be elected by the qualified voters of the city: Mayor, police judge, attorney, assessor, collector, treasurer and, except in cities which adopt the merit system police department, a marshal.

* * *

"Whenever a city contracts for the assessment of property or the collection of taxes by the county or township assessor or collector,

Honorable A. Basey Vanlandingham

respectively, as authorized by section 70.220, RSMo, the city council shall by ordinance provide that at the expiration of the term of the then city assessor or collector, as the case may be, the office is abolished and thereafter no election shall be had to fill the office; except that in the event the contract expires and, for any reason, is not renewed, the council may by ordinance provide for the election of such officer at the next and succeeding regular elections for municipal officers."

The issues presented in your request are similar to those in a request made by the city clerk of a fourth class city in 1937. The clerk stated that in their city it was customary for the mayor to appoint as collector the person who was elected marshal. That procedure was being questioned. At that time the office of collector in fourth class cities was established by Section 6951, RSMo 1929, a statute similar to Section 77.370, RSMo 1969. This statute stated:

"The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to-wit: Mayor, marshal, collector and board of aldermen, and the board of aldermen may provide by ordinance that the same person may be elected marshal and collector, at the same election, and hold both offices, * * *"

Our opinion No. 83 issued April 1, 1937 held that under this statute a marshal and a collector both were to be elected and that the mayor had no right to appoint such officers. The conclusion of that opinion, a copy of which is enclosed, was:

"It is therefore the opinion of this department that the collector of a city of the fourth class must be elected and that if such office is not on the ballot, the electors may write in the name of a qualified person for such office."

Therefore, unless the office of collector can be validly abolished it is our opinion that the collector of a city of the third class having the Mayor-council form of government must be elected.

Your request goes beyond the scope of our 1937 opinion by proposing that (1) the office of city collector be abolished, and (2) the duty of collecting the city's taxes be assigned to a member of the city clerical staff or any other qualified person. It is our

Honorable A. Basey Vanlandingham

opinion that in the context of your request the city would have no power to accomplish by ordinance either of these proposals.

A general premise of the law of municipal corporations is that a municipal corporation derives its powers from the state legislature, rather than directly from the people. Therefore a municipal corporation possesses only those powers expressly contained in enabling legislation and those powers necessarily implied in that legislation. The office of collector was established by Section 77.370, RSMo 1969. Subsection 3 of that section gives the city council the power to abolish the office of collector whenever the city has contracted for collection of taxes by the county or township collector. We find no other statute which would appear to give a third class city the power to abolish the office of collector. Because the proposal to abolish the office of collector is not related to a city contract for the collection of taxes by the county or township collector, the proposal in your request to abolish the office of collector does not fall within the power to abolish under Section 77.370, RSMo 1969. Therefore, it does not appear that the city has been given power by statute to abolish the office of collector in the manner you have proposed. This principle is summarized at 62 C.J.S. 899, Municipal Corporations, Section 467, which states:

"An office created by the legislature may not be abolished by the city unless the city council is given the power by statute to do so."

A similar statement summarizing this principle appears at 56 Am. Jur.2d 298, Municipal Corporations, Section 238. In addition Section 71.010, RSMo 1969 applies:

"Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

We believe the city could not abolish the office of collector, except in conjunction with arrangements described in Section 77.370, RSMo 1969, without violating this section. Therefore it is our opinion that the city could not abolish the office of collector as you have proposed in your request.

Honorable A. Basey Vanlandingham

The second proposal of your request was that the city appoint a member of its clerical staff or any other qualified person to collect the city's taxes. Sections 94.080 to 94.180, RSMo 1969 indicate that it is the city collector's duty to collect the city's taxes. Section 77.370, RSMo 1969 gives a third class city under the Mayor-council form of government the power to contract with the county or township collector for the collection of taxes. We find no other section which would give such a city the power to assign by ordinance the duty of collecting the city's taxes to any other person or agency. In Pearson v. City of Washington, 439 S.W. 2d 756 (Mo. 1969) the Missouri Supreme Court held invalid parts of a city ordinance which established the office of city administrator and which assigned to that office duties which were assigned by statute to the mayor and the city council. In reaching that decision the court stated:

"Municipal corporations owe their origins to, and derive their powers and rights wholly from the state, and 'where the Legislature has authorized a municipality to exercise a power and prescribed the manner of its exercise, the right to exercise the power given in any other manner is necessarily denied.' . . . In the exercise of the legislative powers granted to it by the Legislature, a municipal corporation can enact no ordinance . . . 'which contravenes the statutes' of this state."
l.c. 760

In addition Section 71.010, RSMo 1969 would also require the ordinance which assigns the duties of collecting the city's taxes to conform with the general state statutes which assign those duties to the city collector or to the county or township collector with whom the city has contracted. Therefore, it is our opinion that a third class city of the Mayor-council form of government does not have the power to appoint a member of the city clerical staff or any other qualified person to collect the city's taxes.

CONCLUSION

It is the opinion of this office that a third class city with the Mayor-council form of government cannot abolish the office of collector and appoint a member of the city clerical staff or any other person to collect the city's taxes. Under Section 77.370, RSMo 1969, a third class city with Mayor-council form of government can abolish by ordinance the office of city collector only when the city contracts for the collection of taxes by the county collector or township collector.

Honorable A. Basey Vanlandingham

The foregoing opinion which I hereby approve was prepared by my assistant, Stephen D. Hoyne.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 83
4-1-37, Smith

MARRIAGES:
MAGISTRATES:
COMPENSATION:
CONSTITUTIONAL LAW:

Section 24, Article V of the Missouri Constitution prohibits magistrates from receiving any compensation for solemnizing marriages.

OPINION NO. 71

March 16, 1972

Honorable Frank Bild
Representative, District 47
Room 202I, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Bild:

This opinion is in response to your question asking whether magistrates may accept fees, gifts or gratuities for performing marriage ceremonies.

Section 451.100, RSMo 1969, with respect to the solemnization of marriages provides:

"Marriages may be solemnized by any clergyman, either active or retired, who is a citizen of the United States, and who is in good standing with any church or synagogue in this state, or by any judge of a court of record. Marriages may also be solemnized by a religious society, religious institution, or religious organization of this state, according to the regulations and customs of the society, institution or organization, when either party to the marriage to be solemnized is a member of such society, institution or organization."
(emphasis added)

The magistrate courts are courts of record, Section 476.010, RSMo 1969, within the meaning of the above section.

Section 24 of Article V of the Missouri Constitution, as recently amended, provides:

"All judges and magistrates shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's or magistrate's salary shall be diminished during his term of office. No judge

Honorable Frank Bild

or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business. Judges and magistrates may receive reasonable traveling and other expenses allowed by law. The fees of all courts, judges, and magistrates shall be paid monthly into the state treasury or to the county paying their salaries, as provided by law." (emphasis added)

In our Opinion No. 26, dated December 31, 1946, to the Honorable Walter A. Eggers, copy enclosed, we considered the same question at some length and held that magistrates are not required to solemnize marriages; but if they do so, they may not require a fee.

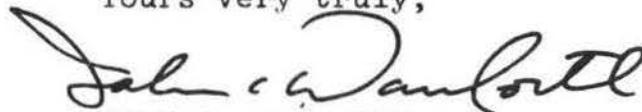
We also note that there is no statutory authority for a magistrate to compel the payment of a fee and no fee authorized for the service of solemnizing marriages. However, marriages are performed in such a case by virtue of the office. Cf., Ward v. St. Louis County, 183 S.W.2d 68 (Mo. 1944). And, in our view, any compensation received for such service regardless of whether it is called a fee or gratuity and whether or not it is voluntary or involuntary constitutes "additional compensation" within the prohibition of Section 24, Article V of the Constitution.

CONCLUSION

It is the opinion of this office that Section 24, Article V of the Missouri Constitution prohibits magistrates from receiving any compensation for solemnizing marriages.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 26
12-31-46, Eggers

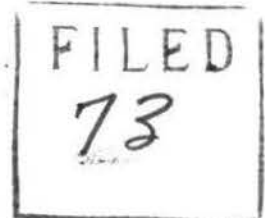
TAXATION (EXEMPTIONS):
CONSTITUTIONAL LAW:

1. Tangible personal property consigned to a warehouse from an out-of-state point acquires a tax situs in this state when it is warehoused for the convenience of the owner of the property; 2. Goods that are shipped from different out-of-state sources and combined together as one item in the warehouse before being forwarded to an out-of-state consignee do acquire tax situs at the warehouse; 3. The documentary proof required to prove that shipments are in transit are those documents that, in the particular business involved, accurately reflect the destination or eventual sale or consignment of the goods; 4. To secure the exemption provided by Section 137.093, RSMo, bills of lading do not necessarily have to show shipments from the point of origin through a Missouri county to the final destination outside the state on one and the same document; 5. A public warehouse owner, when authorized to do so by the owner of tangible personal property consigned to his warehouse, may show documentary proof of in-transit status in the same manner as the actual owner of the goods and claim an exempt status for the owner; 6. The federal import exemption that applies to uncrated goods is binding on county assessors.

OPINION NO. 73

August 17, 1972

Mr. J. E. Riney, Chairman
State Tax Commission
12th Floor Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Riney:

This opinion is issued in response to your request for an interpretation of Section 137.093, RSMo 1969. In your request, you asked the following questions:

"1. When does tangible personal property consigned to a warehouse acquire a tax situs in this state?

"2. Do goods that are shipped from different out-of-state sources and combined together as one item in the warehouse before being forwarded to an out-of-state consignee acquire situs at the warehouse?

"3. What documentary proof is required to prove that shipments are in transit?

Mr. J. E. Riney

"4. Must bills of lading show shipments from the point of origin through a Missouri county to the final destination outside the state on one and the same document?

"5. When a public warehouse owner claims the in-transit exemption for his clients, should he be required to show proof also? If so, what proof is sufficient?

"6. Is the federal import exemption that applies to uncrated goods binding on county assessors?"

Section 137.093, RSMo 1969 states:

"Tangible personal property moving through the state or consigned to a warehouse in this state from a point outside the state, in transit to a final destination outside the state shall, for purposes of taxation, acquire no situs in the state. The owner shall if required, in order to obtain a determination that any property has not acquired a situs in the state, submit to the appropriate assessing officer documentary proof of the in-transit character and the final destination of the property."

This provision has not yet been interpreted by any reported decisions of Missouri courts.

I.

Your first question: "When does tangible personal property consigned to a warehouse acquire a tax situs in this state?" compels an examination of both constitutional doctrines concerning the acquisition of situs for the purpose of the imposition of a personal property tax and the legislative history of this enactment.

A plethora of cases make it abundantly clear that, absent this statute, a personal property tax could be imposed on goods temporarily in this state at a warehouse or storage facility, although intended for ultimate distribution to an out-of-state vendee. E.g., Independent Warehouses, Inc. v. Scheele, 331 U.S. 70, 67 S.Ct. 1062, 91 L.Ed. 1346 (1947); Coe v. Town of Errol, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715 (1886); Old Dominion Steamship Co. v. Virginia, 198 U.S. 299, 25 S.Ct. 686, 49 L.Ed. 1059 (1905); Carey v. New York Central Ry. Co., 165 N.E. 805 (N.Y. 1929); Louisiana Iron & Supply Co. v. Jolly, 51 P.2d 280 (Okla.

Mr. J. E. Riney

1935); Chickasha Cotton Oil Co. v. Grady County, 58 P.2d 590 (Okla. 1936). The general rule, that the personal property of a nonresident actually situated in another state is not to be assessed and taxed against him in this state, but the property of either a resident or a nonresident is taxable here, if it be found situate within the local jurisdiction, whether it be in the hands of the owner himself or his agents, was stated in the decision of City of St. Louis v. Wiggins Ferry Company, 40 Mo. 580 (1867). Compendiums of other related cases can be found at 110 A.L.R. 707 (1937); 171 A.L.R. 283 (1947); and 4 A.L.R.2d 244 (1949).

The principle is well established that personal property actually in transit in interstate commerce is protected by the commerce clause of the Federal Constitution from local taxation in the state through which it passes. When such journey is interrupted, the question of whether the goods involved have lost their in-transit status and immunity from taxation arises. The general principle enunciated by the Supreme Court of the United States in such cases is that if the interruption of the journey between states is of a temporary nature, due to the necessities of the journey or for the purpose of safety and convenience in the course of movement, the in-transit status of the shipment is not lost. But in-transit status is lost when ". . . property has come to rest within a state, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the state, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the state and thus subject to its taxing power." Minnesota v. Blasius, 290 U.S. 1, 11, 54 S.Ct. 34, 78 L.Ed. 131 (1933). The Blasius decision, supra, also observed:

" . . . Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. . . ." (290 U.S. at 10)

Therefore, the protection of the commerce clause of the United States Constitution is lost when such property is no longer in transit when goods are consigned to a warehouse for the convenience of the owner so that he might dispose of the goods either in the state of Missouri or outside the state of Missouri. See also United States v. Great Lakes Pipeline Co., 328 F.2d 79 (8th Cir. 1964) for a discussion of certain leading cases concerning in-transit status.

Mr. J. E. Riney

Section 137.093 attempts to grant an exemption for certain tangible personal property warehoused in this state. Section 6 of Article X of the Constitution of Missouri is a limitation upon the power of the legislature of Missouri to exempt property from taxation. There is no specific grant of authority to the legislature to exempt tangible personal property moving through the state or consigned to a warehouse. The concluding sentence of Section 6 of Article X states:

" . . . All laws exempting from taxation property other than the property enumerated in this article, shall be void."

When confronted with the possibility of differing interpretations of a law, one that would preserve its constitutionality and one that would void it, courts invariably choose the former course. E.g., State ex rel. R. Newton McDowell, Inc. v. Smith, 67 S.W.2d 50 (Mo. 1933). Therefore, it is the opinion of this office that Section 137.093, RSMo 1969 is to be applied as if it merely reenunciated the well-established principles stated by the United States Supreme Court concerning taxation of personal property in interstate commerce. Therefore, tangible personal property consigned to a warehouse in this state acquires a tax situs when the consignment to a warehouse is not due to the exigencies of transportation but is for the convenience and benefit of the owner.

II.

For your second question, you ask:

"Do goods that are shipped from different out-of-state sources and combined together as one item in the warehouse before being forwarded to an out-of-state consignee acquire situs at the warehouse?"

In view of the general statutory language of Section 137.093, RSMo 1969, and the answer to the preceding question, this question must be answered in the affirmative. For example, a warehouse could have consigned to it a carload of tires and a carload of auto parts. If the warehouse personnel combined these shipments and sent them to out-of-state vendees, such action by the warehouse, on behalf of the owner, would deprive these goods of their in-transit status because such a combination would clearly be for the owner's benefit. If manufacturing or processing activities occur, this would also deprive the goods of their in-transit status. By their very nature, manufacturing or processing activities, or the combination of goods as one item in the warehouse, are activities designed to benefit the

Mr. J. E. Riney

owner and not situations occasioned by the exigencies of transportation. Therefore, the occurrence of such activities would deprive the goods involved of their in-transit status, and such goods do have a tax situs in this state.

III.

You also ask, in question three:

"What documentary proof is required to prove that shipments are in transit?"

The statute does not state what documentary proof is appropriate. This office could not state what proof would be appropriate as to do so would be exercising a legislative function. However, documentary proof that might be appropriate would include bills of lading, affidavits, invoices, etc., that show the in-transit nature of the goods. The assessor can require whatever showing of facts is necessary to make a determination as to whether goods are in transit.

IV.

Your fourth question asks:

"Must bills of lading show shipments from the point of origin through a Missouri county to the final destination outside the state on one and the same document?"

This requirement could be imposed to qualify tangible personal property moving through the state for an exemption. However, because of the silence of the statute on a documentary proof required, other documentation could be used to bring goods within the statutory exemption. Normal business practice often dictates the use of, for example, multiple bills of lading, and because of the absence of direction concerning the documentary proof required, an assessor would be unauthorized to impose this requirement as a condition for exemption.

V.

Your fifth question is:

"When a public warehouse owner claims the in-transit exemption for his clients, should he be required to show proof also? If so, what proof is sufficient."

Mr. J. E. Riney

If the owner of the warehouse in which the goods are stored seeks to invoke the exemption on behalf of his clients, he is clearly acting on their behalf and in the capacity of an agent. As such, he stands in the owner's shoes and should have the same obligation to show documentary proof imposed upon him as an owner. Sufficient proof in his case would be the same evidence as would be adduced by the owner. Of course, he would have to be able to substantiate his agency status.

Related to this inquiry is the question of who should be assessed for this personal property tax, the owner of the goods or the warehouseman. The relevant statutory provisions pertaining to assessment, Sections 137.075, 137.095, and 137.115, RSMo 1969, support the conclusion that the assessor should first seek to obtain a correct statement of all taxable tangible personal property owned by any person and warehoused in this state. If this is not possible, then the assessor should seek such a statement from the warehouseman to whom the goods have been consigned. Section 137.075 states:

"Every person owning or holding real property or tangible personal property on the first day of January, including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

Section 137.095, in relevant part, provides:

"The real and tangible personal property of all corporations operating in any county in the state of Missouri and in the city of St. Louis, and subject to assessment by county or township assessors, shall be assessed and taxed in the county in which the property is situated on the first day of January of the year for which the taxes are assessed, and every general or business corporation having or owning tangible personal property on the first day of January of each year, which is situated in any other county than the one in which the corporation is located, shall make return to the assessor of the county or township where the property is situated, in the same manner as other tangible personal property as required by law to be returned, . . ."

Section 137.115 directs the assessor to:

Mr. J. E. Riney

" . . . call at the office, place of doing business or residence of each person required by this chapter to list property, and require the person to make a correct statement of . . . all taxable tangible personal property owned by the person or under his care, charge or management, taxable in the county, except merchandise upon which he is required to pay a license tax."

The Supreme Court of this state, in the decisions of City of St. Louis v. Wiggins Ferry Company, 40 Mo. 580 (1867) and Curtis v. Ward, 58 Mo. 295 (1874) early ruled that the property of a non-resident is taxable in this state if it is to be found within this jurisdiction, whether in the hands of the owner or his agents.

In collecting the personal property taxes imposed, the collector of revenue for the county will, of course, follow the procedures established by Chapter 139 of the Missouri Revised Statutes. Such procedures include the remedy granted by Section 139.120, RSMo 1969, permitting the seizure and sale of personal property of the person liable for taxes.

VI.

For your final question you ask: "Is the federal import exemption that applies to uncrated goods binding on county assessors?"

Article I, Section 10 of the Constitution of the United States provides that "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." This provision has been subject to considerable litigation and the general principle that has been often repeated is that goods imported do not lose their character as imports, for purposes of state taxation, until they have passed from the control of the importer or have been broken up by him from their original cases. Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964); See generally, Hooven & Alison Co. v. Evatt, 324 U.S. 652, 65 S.Ct. 870, 89 L.Ed. 1252 (1945); Annot., 20 A.L.R.2d 152 (1951); Annot., 89 L.Ed. 1279 (1945). The provisions of this section of the Constitution are to be given full effect by county assessors.

CONCLUSION

It is the opinion of this office that:

Mr. J. E. Riney

1. Tangible personal property consigned to a warehouse from an out-of-state point acquires a tax situs in this state when it is warehoused for the convenience of the owner of the property;
2. Goods that are shipped from different out-of-state sources and combined together as one item in the warehouse before being forwarded to an out-of-state consignee do acquire tax situs at the warehouse;
3. The documentary proof required to prove that shipments are in transit are those documents that, in the particular business involved, accurately reflect the destination or eventual sale or consignment of the goods;
4. To secure the exemption provided by Section 137.093, RSMo, bills of lading do not necessarily have to show shipments from the point of origin through a Missouri county to the final destination outside the state on one and the same document;
5. A public warehouse owner, when authorized to do so by the owner of tangible personal property consigned to his warehouse, may show documentary proof of in-transit status in the same manner as the actual owner of the goods and claim an exempt status for the owner;
6. The federal import exemption that applies to uncrated goods is binding on county assessors.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Peter H. Ruger.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

COUNTY CORONER:
DEATH CERTIFICATE:
DIVISION OF HEALTH:

A coroner in a county of the fourth class does not have the authority to prepare and submit a certificate of death to the local registrar when a death has allegedly occurred in the county but the body of the decedent has not been discovered.

OPINION NO. 77

May 2, 1972

Honorable J. William Holliday
Prosecuting Attorney
Clark County
220 North Morgan Street
Kahoka, Missouri 63445



Dear Mr. Holliday:

You recently requested an opinion of this office on the following question:

"Does a County Coroner in a County of the Fourth Class have authority under 193.130 and 193.146, RSMo, 1969, to prepare and submit a certificate of death to the local registrar where a death has allegedly occurred in the county by drowning, but no body has been discovered?"

Section 193.130, RSMo 1969, states:

"A certificate of every death or stillbirth shall be filed with the local registrar of the district in which the death or stillbirth occurred within three days after the occurrence is known, or if the place of death or stillbirth is not known then with the local registrar of the district in which the body is found within twenty-four hours thereafter. In every instance a certificate shall be filed prior to interment or other disposition of the body."

Section 193.140 states, in some detail, the procedure to be followed in preparing a death certificate. The last sentence of that provision contains the following language:

Honorable J. William Holliday

". . . If the circumstances suggest that the death or stillbirth was caused by other than natural causes, the local registrar shall refer the case to the coroner for investigation and certification."

In this case, if we were to hold that the coroner cannot prepare a certificate of death, the question then becomes how can death be proved? The answer to that question can be useful in resolving the question at hand. Of course, the statutory presumption that a seven-year absence indicates death is applicable in this state. This presumption has been extensively described in 25A, C.J.S., Death, Section 9 (1941) as follows:

"In civil cases, the death of a person is to be determined as a question of fact, and may be established in a variety of ways. It may be established judicially by proof of facts which raise a presumption that the person is dead. Where a person has disappeared it is not always necessary to wait for seven years before attempting to prove that he is dead; death may be proved by showing facts from which a reasonable inference would lead to that conclusion.

"The fact of death may be proved by direct evidence or it may be proved in some instances by circumstantial evidence alone. If that fact of death is proved by evidence and inferences therefrom, no presumption as to death, common law or statutory, need be brought into play."

Other jurisdictions have squarely held that you need not find a body to establish the fact of death. Further, you need not wait until the seven-year period has run when evidence can be adduced to show death. The court in In re Estate of Bencel, 189 A.2d 733 (N.J. 1963) rejected the contention that, to show death, someone had to see the death occur and be able to identify the decedent. The court noted that "circumstantial evidence, from which the fact of death may legitimately be inferred, will suffice." In that case, the finding of burned wreckage from a deepsea fishing boat was sufficient evidence to establish the death of a person who was allegedly a passenger on the boat. In Hanzes v. Flavio, 125 N.E. 612 (Mass. 1920), the evidence that a person was seen engaged in battle, after which he was not seen alive was competent on the point whether he was killed in battle. Finally, in Adler v. University Boat Mart,

Honorable J. William Holliday

Inc., 387 P.2d 509 (Wash. 1963), the court held that death by drowning could be established by circumstantial evidence without the presumption afforded by the lapse of seven years, even though the decedent's body was not recovered from the water in which the decedent was last seen. In that case there was no direct testimony that the other survivors of the boating accident had seen the decedent go down. Thus, it would seem that a judicial determination could be made that death had occurred in this case prior to the lapse of seven years.

Thus, there is much authority for the proposition that the fact of death can be determined without the presence of a body. However, all of the above cited cases deal with situations in which a judicial determination of death was sought. In none of these cases was the precise issue presented by this request involved. However, the fact that none of these cases involved the situations in which the coroner had relied on testimony to issue a certificate of death indicates that, at least in the jurisdictions represented by these cases, coroners interpret their authority in such a way as to require the presence of a body before they can certify that death has occurred.

The last sentence of Section 193.030, RSMo 1969, states that a certificate shall be filed prior to the interment or the disposition of the body. In subsection 3 of Section 193.140 there is a reference to "issuing a permit for burial, cremation or other disposition of the body." It thus appears that the provisions of Sections 193.130 and 193.140 contemplate the presence of a body before the coroner has the authority to act under such sections.

Chapter 58 of the Missouri Revised Statutes is the statutory provision dealing with coroners. Nowhere in this chapter is a coroner in a county of the fourth class specifically granted the authority to prepare and submit a certificate of death or to hold an inquest when no corpse is present. Enclosed is a copy of Opinion No. 6, November 26, 1951, which states that the coroner has the right to declare the cause of death without an inquest when he "views" a body. However, this opinion does not compel the converse of this proposition, that by inquest, he may determine the cause of death when there is no body present. In fact, the inquest procedure, as authorized by Section 58.260 specifically provides that the presence of a dead body is the factor bringing that section into operation. In addition, Section 58.360, RSMo 1969, states that the coroner's jury must view the body before reaching its verdict.

CONCLUSION

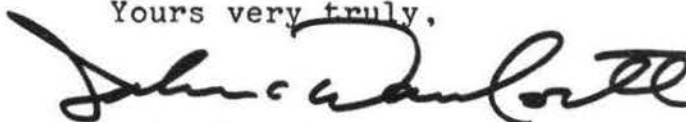
It is the opinion of this office that a coroner in a county of the fourth class does not have the authority to prepare and

Honorable J. William Holliday

submit a certificate of death to the local registrar when a death has allegedly occurred in the county but the body of the decedent has not been discovered.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Peter H. Ruger.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 6
11-26-51, Beckham

TORTS:
RECREATION:
STATE PARK BOARD:
SOVEREIGN IMMUNITY:

The state of Missouri acting through the Inter-Agency Council for Outdoor Recreation and the Missouri State Park Board, pursuant to Section 258.500, RSMo 1969, can agree

under long-term contract with the United States to provide operation, maintenance and replacement of federally financed water control projects under the Federal Water Projects Recreation Act, 16 U.S.C.A., Sections 4601-12 and 13, and further to agree to reimburse the federal government in those projects; that under present law neither the Council nor the Park Board has the authority to agree to hold and save the United States free from damages due to the construction works.

OPINION NO. 78

May 25, 1972

Mr. Clifford L. Summers
Executive Director
Water Resources Board
P. O. Box 271
Jefferson City, Missouri 65101



Dear Mr. Summers:

This is in reply to your request for an official opinion of this office asking several questions relating to state involvement with the federal government on federal water resources projects.

Your questions are whether the state of Missouri, acting through the Missouri State Park Board can: (1) agree under long-term contract with the United States to provide operation, maintenance and replacement of federally financed water control projects and to agree to reimburse the federal government for all or part of those added costs associated with identified local benefits or uses, in return for investment by the federal government in these projects; and (2) can the state further agree to hold and save the United States free from damages due to the construction works and, if so, does the state have legal authority to pay damages for failure to perform.

The federal water resource projects you refer to are those which come under the Federal Water Projects Recreation Act, 16 U.S.C.A., Sections 4601-12 and 13 (P.L. 89-72, 79 Stat. 213-218).

Sections 4601-12 and 13 of 16 U.S.C.A. provide as follows:

Mr. Clifford L. Summers

"It is the policy of the Congress and the intent of this Act that (a) in investigating and planning any Federal navigation, flood control, reclamation, hydroelectric, or multiple-purpose water resource project, full consideration shall be given to the opportunities, if any, which the project affords for outdoor recreation and for fish and wildlife enhancement and that, wherever any such project can reasonably serve either or both of these purposes consistently with the provisions of this Act, it shall be constructed, operated, and maintained accordingly; (b) planning with respect to the development of the recreation potential of any such project shall be based on the coordination of the recreational use of the project area with the use of existing and planned Federal, State, or local public recreation developments; and (c) project construction agencies shall encourage non-Federal public bodies to administer project land and water areas for recreation and fish and wildlife enhancement purposes and operate, maintain, and replace facilities provided for those purposes unless such areas or facilities are included or proposed for inclusion within a national recreation area, or are appropriate for administration by a Federal agency as a part of the national forest system, as a part of the public lands classified for retention in Federal ownership, or in connection with an authorized Federal program for the conservation and development of fish and wildlife. Pub.L. 89-72, § 1, July 9, 1965, 79 Stat. 213." (16 U.S.C.A., Section 460f-12)

"(a) If, before authorization of a project, non-Federal public bodies indicate their intent in writing to agree to administer project land and water areas for recreation or fish and wildlife enhancement or for both of these purposes pursuant to the plan for the development of the project approved by the head of the agency having administrative jurisdiction over it and to bear not less than one-half the separable costs of the project allocated to either or both of said purposes, as the case may be, and all the costs of operation, maintenance, and replacement incurred therefor--

Mr. Clifford L. Summers

(1) the benefit of the project to said purpose or purposes shall be taken into account in determining the economic benefits of the project;

(2) costs shall be allocated to said purpose or purposes and to other purposes in a manner which will insure that all project purposes share equitably in the advantages of multiple-purpose construction: Provided, That the costs allocated to recreation or fish and wildlife enhancement shall not exceed the lesser of the benefits from those functions or the costs of providing recreation or fish and wildlife enhancement benefits of reasonably equivalent use and located by the least costly alternative means; and

(3) Not more than one-half the separable costs and all the joint costs of the project allocated to recreation and fish and wildlife enhancement shall be borne by the United States and be non-reimbursable.

Projects authorized during the calendar year 1965 may include recreation and fish and wildlife enhancement on the foregoing basis without the required indication of intent. Execution of an agreement as aforesaid shall be a prerequisite to commencement of construction of any project to which this subsection is applicable.

"(b) The non-Federal share of the separable costs of the project allocated to recreation and fish and wildlife enhancement shall be borne by non-Federal interest, under either or both of the following methods as may be determined appropriate by the head of the Federal Agency having jurisdiction over the project: (1) payment, or provision of lands, interests therein, or facilities for the project; or (2) repayment, with interest at a rate comparable to that for other interest-bearing functions of Federal water resource projects, within fifty years of first use of

Mr. Clifford L. Summers

project recreation or fish and wildlife enhancement facilities: Provided, That the sources of repayment may be limited to entrance and user fees or charges collected at the project by non-Federal interests if the fee schedule and the portion of fees dedicated to repayment are established on a basis calculated to achieve repayment as aforesaid and are made subject to review and renegotiation at intervals of not more than five years. Pub.L. 89-72, § 2, July 9, 1965, 79 Stat. 214." (16 U.S.C.A., Section 460l-13)

In 1969 the Missouri General Assembly enacted Senate Bill No. 58 to specifically provide for state participation in such federal water resource projects. Such law now appears as Sections 258.500 through 258.540, RSMo 1969.

Section 258.510, RSMo, provides as follows:

"The general assembly of Missouri may transfer money from the general revenue fund to the 'Missouri Federal Water Projects Recreation Fund', which is hereby created, and may appropriate money from the fund for purposes of paying nonfederal costs associated with the enhancement of recreation and fish and wildlife benefits on federal reservoir lands and waters as required by the 'Federal Water Projects Recreation Act' (P.L. 89-72, 79 Stat. 213-218). Any unexpended balance in the Missouri federal water projects recreation fund at the end of any appropriation period shall not be transferred to the general revenue fund of the state treasury and, accordingly, shall be exempt from the provisions of section 33.080, RSMo, relating to transfer of funds to the general revenue funds of the state by the state treasurer."

Section 258.530, RSMo, provides as follows:

"The inter-agency council for outdoor recreation, with the approval of the pertinent state agency having primary responsibility and authority to acquire and manage land or water for recreation or fish and wildlife enhancement, may indicate in writing to appropriate federal officials the intent of the state of Missouri to enter into agreements to administer

Mr. Clifford L. Summers

federal project land and water areas for recreation or fish and wildlife enhancement, and under instructions received through appropriate joint concurrent resolutions duly passed by the general assembly may enter into agreements or contracts to administer such lands in accordance with the provisions of the federal water projects recreation act, and to bear not less than one-half of the separable costs of the project allocated to those purposes and to bear all costs of operation, maintenance, and replacement incurred therefor from appropriations made from the fund; and such action shall be applicable to federal projects prior to authorization by congress, to authorized projects, and to completed works."

It is our opinion that under Section 258.530 the Missouri State Park Board is the "pertinent state agency having primary responsibility and authority to acquire and manage land or water for recreation." The Park Board has the authority and duty under Chapter 253, RSMo, to provide for a state park program, whereby park is defined as:

" . . . any land, site or object primarily of recreational value or of cultural value because of its scenic, historic, prehistoric, archeologic, scientific, or other distinctive characteristics or natural features;" (Section 253.010(3), RSMo)

In performing its duties the Park Board:

" . . . is hereby authorized to accept or acquire by purchase, lease, donation, agreement or eminent domain, any lands, or rights in lands, sites, objects or facilities which in its opinion should be held, preserved, improved and maintained for park or parkway purposes. The board is authorized to improve, maintain, operate and regulate any such lands, sites, object or facilities when such action would promote the park program and the general welfare. . . ." (Section 253.040.1, RSMo)

In a previous opinion of this office (No. 45, Missouri State Park Board, 1955), we held that under Chapter 253 the Park Board is authorized to accept a license to land in a federal reservoir area for park purposes.

Mr. Clifford L. Summers

It is our opinion that the Park Board still is so authorized but that for any federal water resources projects that come under the Federal Water Project Recreation Act, Sections 258.500 through 258.540, apply.

Therefore, for such projects the Park Board would be authorized to give approval to the Inter-Agency Council for Outdoor Recreation to indicate in writing to the appropriate federal officials the intent of the state of Missouri to enter into agreements. Then, after proper instruction through appropriate joint concurrent resolution of the General Assembly, the Council may enter into an agreement or contract. It is suggested that if the Park Board is going to manage the facilities that the Board also enter into the agreement or contract.

Therefore, if such steps are followed, it is our opinion that the state of Missouri through the Council and the Park Board can agree by long-term contract to provide operation, maintenance and replacement of federally financed water control projects, and to bear not less than one-half of the separable costs of the project allocated to recreation purposes.

The second question regarding the state is whether the state or the Park Board can agree to hold the United States free from damages. To do so would mean that the state has consented to be sued in tort, or, stated another way, has waived sovereign immunity.

We find nothing in the Missouri Constitution or in the laws of the state (including Chapter 253) whereby sovereign immunity in this regard has been waived.

Therefore, at the present time neither the Council nor the Park Board could agree to hold and save the United States free from damages.

We recognize the argument that the General Assembly could do so by a joint concurrent resolution pursuant to Section 258.530. In 81 C.J.S., States, Section 215, it is stated:

"There is authority to the effect that the legislature may, without attempting to pass a law pursuant to such a provision, pass a joint resolution, which, although not effective as a law, is an effective consent by the sovereign to subject itself to suit; but it has also been held that suit cannot be maintained against the state where legislation, attempted pursuant to such a provision, is invalid as a law because not passed in accordance

Mr. Clifford L. Summers

with the rules and solemnities prescribed by
the fundamental law. . . ."

We have examined the cases cited from other states and adhere
to the latter view.

Therefore, it would seem that only the legislature could, by
a duly enacted statute, waive sovereign immunity. Whether or not
such a statute would be valid cannot be answered until such a stat-
ute is enacted and presented for review.

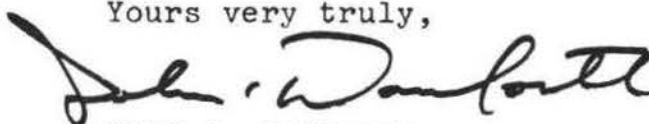
Since, at the present time, the state through the Park Board
cannot agree to hold the United States free from damages, it neces-
sarily follows that there is no legal authority to pay damages.

CONCLUSION

It is the opinion of this office that the state of Missouri
acting through the Inter-Agency Council for Outdoor Recreation
and the Missouri State Park Board, pursuant to Section 258.500,
RSMo 1969, can agree under long-term contract with the United States
to provide operation, maintenance and replacement of federally fi-
nanced water control projects under the Federal Water Projects Re-
creation Act, 16 U.S.C.A., Sections 4601-12 and 13, and further to
agree to reimburse the federal government in these projects; that
under present law neither the Council nor the Park Board has the
authority to agree to hold and save the United States free from
damages due to the construction works.

The foregoing opinion, which I hereby approve, was prepared
by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 45
12-5-55, Jaeger

LEGISLATURE:
LEGISLATORS:
CONSTITUTIONAL LAW:
ELECTIONS:

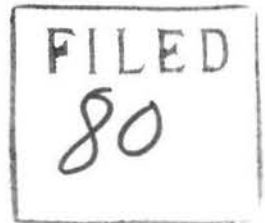
In order for a person to be eligible to file as a candidate for the office of state senator in a district in which such office will be filled at the November 7, 1972 general

election, he must have been a resident of such district for one year prior to the November 7, 1972 election date.

OPINION NO. 80

February 14, 1972

Honorable Donald J. Gralike
State Representative, District 49
Room 301 Capitol Building
Jefferson City, Missouri 65101



Dear Representative Gralike:

This is in answer to your opinion request of recent date in which you inquire as to the eligibility of certain persons to file for the office of state senator in districts in which senators are to be elected at the November 7, 1972 election. You asked whether an individual is eligible to file for the office of state senator at such election if he does not live in a presently constituted state senatorial district in which the 1972 election is to be held to fill the office of state senator but does live in the county which contains all or a part of such senatorial district.

Section 6 of Article III of the Constitution of Missouri provides as follows:

"Each senator shall be thirty years of age, and next before the day of his election shall have been a qualified voter of the state for three years and a resident of the district which he is chosen to represent for one year, if such district shall have been so long established, and if not, then of the district or districts from which the same shall have been taken."

Your question is answered by Opinion No. 104 rendered February 7, 1967 to Representative Richard J. Rabbitt, which opinion is referred to in your opinion request. We are enclosing a copy of such opinion.

Honorable Donald J. Gralike

Such opinion ruled as to the eligibility of individuals to file for the office of representative in the General Assembly of Missouri, whereas your question has to do with the eligibility of an individual to file for the office of state senator. However, we believe that the similarity of the constitutional provisions applicable to representatives and senators in cases in which districts are established more than one year preceding the election makes it clear that the ruling in Opinion No. 104 is equally applicable to your question.

In such opinion the Attorney General held that under the provisions of Section 4 of Article III of the Constitution of Missouri an individual must have been a resident of the district from which he files for the office of representative for one year before the date of the general election to fill such office if the district is in existence for more than one year prior to such election date.

The opinion held on page 3:

"Examination of this section of the Constitution shows that the language 'county or district' is used three times in the section. The first two times it seems clear that where representative districts have been established for more than one year the representative to be qualified must be a voter for two years and a resident of his district for one year. . . ."
(Emphasis added)

That opinion, of course, made a further ruling as to the eligibility of persons to file for the office of representative when representative districts were not in existence for a year or more prior to the election date. However, that part of the opinion has no relevance insofar as your question is concerned because the senatorial districts in which senators will be elected at the November 7, 1972 elections will have been in existence more than one year on the date of such election. The records of the office of the Secretary of State disclose that the final report of the Senatorial Redistricting Commission establishing senatorial districts in the state of Missouri was filed in that office August 30, 1971. On such date the Missouri senatorial districts came into existence. Section 7, Article III, Missouri Constitution. It follows therefore that since senatorial districts were created in this state more than one year prior to the November 7, 1972 elections an individual in order to be eligible to file as a candidate for election for state senator at such election must have been a resident of the district in which he files for a period of one year before the 1972 election date.

Honorable Donald J. Gralike

CONCLUSION

It is the opinion of this office that in order for a person to be eligible to file as a candidate for the office of state senator in a district in which such office will be filled at the November 7, 1972 general election, he must have been a resident of such district for one year prior to the November 7, 1972 election date.

The foregoing opinion which I hereby approve was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a more compact, flowing style.

JOHN C. DANFORTH
Attorney General

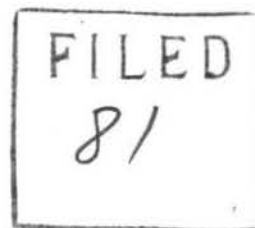
Enclosure: Op. No. 104
2-7-67, Rabbitt

CITIES, TOWNS & VILLAGES: (1) A duly elected town trustee forfeits his office by moving from the town of his election; (2) until his removal from the board of trustees, a nonresident trustee is a de facto officer and his official acts and decisions are valid; and, (3) Section 80.230, RSMo 1969 provides that all vacancies in the board of trustees shall be filled by the remaining members of the board, the chairman or temporary chairman not voting except in case of a tie.

OPINION NO. 81

August 2, 1972

Honorable Jack E. Gant
State Senator
9517 East 29th Street
Independence, Missouri 64052



Dear Senator Gant:

This is in response to your request for an opinion concerning residency requirements for town commissioners. Specifically, you requested answers to the following questions:

"If a Commissioner of a town moves from that town, may he still legally serve as a Commissioner of that town? Could his participation as Commissioner, and consequently, the activities and decisions of the town's Commission, be legally challenged because of this? If he is no longer legally qualified to serve as a Commissioner of this town, how is his replacement to be elected?"

Chapter 80, RSMo 1969, which governs the organization of towns and villages, entrusts the town's corporate powers and duties to a "board of trustees". We understand that in town government the words "commissioner" and "trustee" are roughly synonymous; nevertheless, we shall hereafter use the statutory word "trustee".

Section 80.050 establishes the qualifications, or perhaps more accurately, the disqualifications for town trustees:

Honorable Jack E. Gant

"No person shall be a trustee who has not attained the age of twenty-one years; who is not a citizen of the United States; who is not an inhabitant of the town at the time of his election, and has not resided therein for one whole year next preceding the time of his election. . . ."

The basic issue is whether the residency or inhabitancy requirement, which appears merely to state a qualification for election, can also be construed as a disqualification against continuing in office. Section 80.050 has not been construed in any reported Missouri cases.

The Missouri courts, however, have spoken strongly on the nonresidence of officeholders where similar statutes were involved. In 1907 the St. Louis Court of Appeals upheld the ouster of a city alderman who, after an election, moved from his ward. State ex rel. Johnston v. Donworth, 105 S.W. 1055 (St.L.Ct.App. 1907). The statute construed in Donworth required aldermen to be twenty-one years old, a citizen of the United States, an inhabitant of the city for one year next preceding his election, and a resident of the ward from which he was elected. There was no specific statutory provision requiring a continuous residency while holding office, but the court so found, declaring:

"Several incongruities arise if we accept the reasoning of defendant's counsel. If a person elected alderman is a resident of the ward on the day of the election, but immediately moves into another ward, he could serve his two-year term; and, if all the aldermen of a city should happen to move into one ward during their respective terms of office, they would still constitute the board of aldermen. Such contingencies are opposed to the policy of the statute, which policy is to require aldermen to be residents of the ward, not only when elected but during their terms in office." 1.c. 1056 (emphasis added).

In State ex rel. City of Republic v. Smith, 139 S.W.2d 929 (Mo. banc 1940), the Missouri Supreme Court, citing its approval of the Donworth case, also held that the requirement that an alderman be a resident of the ward from which he is elected was a continuing requirement, and that an alderman that moved from the city was properly ousted.

Honorable Jack E. Gant

These Missouri cases demonstrate the strong public policy of Missouri to require that those elected to office from a ward shall remain residents during their terms, and therefore, one who removes from the ward from which he was elected forfeits his office.

The provisions of Section 80.120 further confirm a continuing residency requirement as the true legislative intent. This section relates to the chairman of the board of trustees of a town and provides in part as follows:

" . . . and in case he shall die, resign, be removed from office or remove from the town, the board of trustees shall appoint one of their number chairman, who shall hold the office of the unexpired term."

The phrase "or remove from the town" indicates that the individual is no longer a trustee as in all of the preceding eventualities. Thus, it is apparent the legislature intended that a person who removes from the town in which he was elected trustee has by such action forfeited his office.

Your second question concerns the legality of the official acts of such a trustee. The court in State v. Smith, supra, considered the official acts of an alderman ~~who became unqualified by moving from his ward.~~* The court held that this alderman was a "de facto officer" and said:

" . . . ' . . . Where one is actually in possession of a public office and discharges the duties thereof, the color of right which constitutes him a de facto officer, may consist in an election or appointment, holding over after the expiration of his term, or by acquiescence by the public for such a length of time as to raise the presumption of a colorable right by election, appointment, or other legal authority to hold such office. The duties of the office are exercised under color of a known election or appointment which is void for want of power in the electing or appointing body, or for some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public.' . . ." l.c. 933.

The court further held that acts of the de facto officer are valid and cannot be questioned because of the officer's

* Erratum (10/29/84).

Honorable Jack E. Gant

ineligibility. We believe that the Smith case applies to the present situation, making the nonresident trustee a de facto officer and validating his official acts and decisions.

The final question concerns the selection of a replacement trustee. We note that Section 80.230, RSMo 1969 appears to answer this question adequately:

"All vacancies in the board of trustees shall be filled by the remaining members of the board. In case the office of chairman becomes vacant, the remaining member shall select one of their own number as temporary chairman and then proceed to elect some person to fill such vacancy; provided, the chairman or temporary chairman shall have no vote except in case of a tie."

We enclose Opinion No. 328 issued September 13, 1962 regarding the role of the chairman in filling vacancies on the board of trustees.

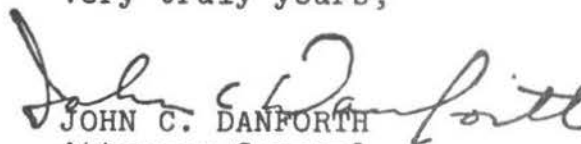
CONCLUSION

It is therefore the opinion of this office that:

(1) A duly elected town trustee forfeits his office by moving from the town of his election; (2) until his removal from the board of trustees, a nonresident trustee is a de facto officer and his official acts and decisions are valid; and, (3) Section 80.230, RSMo 1969 provides that all vacancies in the board of trustees shall be filled by the remaining members of the board, the chairman or temporary chairman not voting except in case of a tie.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Leland B. Curtis.

Very truly yours,


JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 328
9-13-62, Anderson

March 6, 1972

OPINION LETTER NO. 82
Answer by letter-Wieler

Mr. James E. Schaffner
Director of Revenue
Department of Revenue
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Schaffner:

This is in response to your request for an opinion as to the following questions:

- "1. Does the director of revenue have authority to deny a duplicate or substitute license to a person who alters his operator or chauffeur license by changing the date of birth, or name, or license number, or other information entered on the license?
- "2. Is the altered license itself all that is needed by the director to support his denial action?
- "3. If the answers to questions one and two are in the affirmative may the denial remain in effect until the expiration date of the original operator of chauffeur license?"

In answering this request, it will not be necessary to discuss the possible criminal violations arising from alteration of one's driver's license or knowingly possessing such an altered license as well as the criminal sanctions involved. We do note that Chapter 302, RSMo 1969, does not require a suspension or revocation of one's driving privilege upon the finding that he has altered his operator's or chauffeur's license or is in knowing possession of such a license.

Mr. James E. Schaffner

Section 302.185, RSMo 1969, provides that a chauffeur's or motor vehicle operator's license which has been lost or destroyed may be replaced by a duplicate or substitute if the person to whom such license was issued furnishes satisfactory proof of loss or destruction to the Director of Revenue and pays a fee of twenty-five cents for the duplicate or substitute license. In our opinion, a person whose driver's license has been altered is entitled to seek a duplicate or substitute under this section. As of the moment of alteration, a driver's license loses its validity as an instrument issued by the state for the purpose of driving. This destruction is sufficient to meet the language of Section 302.185 and thereby entitles a person who is otherwise qualified to drive to seek a substitute license in the absence of any statutory provision forbidding the issuance of such a substitute to one who has purposely altered his original license.

Yours very truly,

JOHN C. DANFORTH
Attorney General

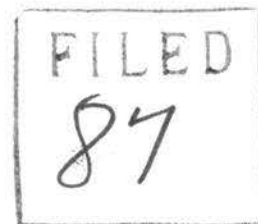
ELECTIONS:
CANDIDATES:
COMMITTEEMEN:
COUNTY CLERK:

A county clerk may refuse to place the name of a candidate he believes to be ineligible on the ballot and his action is subject to review by the courts. A person cannot have a residence for voting purposes only which is separate from his legal residence.

OPINION NO. 87

April 11, 1972

Honorable Rupert G. Usrey
Prosecuting Attorney
Holt County, Courthouse
Oregon, Missouri 64473



Dear Mr. Usrey:

This letter is in answer to your opinion request in which you ask:

"1. May the County Clerk consider facts other than those contained in the declaration of candidacy of a township committeeman to determine whether or not the candidate is eligible to have his name printed on the primary ballot?

"2. May a person maintain his home and family in one township and his legal or voting residence in another township and thereby be a qualified elector in a township other than that in which he lives?"

You also state that:

"Certain persons have filed a declaration of candidacy for township committeeman or committeewoman, alleging in such declaration, residence in a township other than that in which they live and maintain their homes and families. As I understand it, these candidates have always voted in the township from which they seek to be elected, and apparently are of the

Honorable Rupert G. Usrey

opinion that they may maintain a legal and voting residence in the township and represent it as committeeman, even though they no longer live in the township."

Section 120.770, RSMo 1969 provides in part:

". . . Any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman by complying with the provisions of section 120.340 and, in all counties in this state now or hereafter containing a city of the first class, by also paying the sum of five dollars to the treasurer of the county committee of the party on whose ticket he or she seeks election."

Section 120.340, RSMo 1969 provides for the time of filing a declaration of candidacy and the form to be used in primary elections. Further, Section 120.370, RSMo 1969 provides that for certain offices, including the office of committeeman or committeewoman, the declaration must be filed in the office of the county clerk in third class counties.

In answer to your first question, the case of Mansur v. Morris, 196 S.W.2d 287 (Mo. 1946) holds that the duty of the county clerk is not purely ministerial. While we find no other Missouri cases on this precise point it is our view that the clerk may refuse to place the name of a candidate he believes to be ineligible on the ballot. In reaching this conclusion we note that the courts have consistently refused to grant relief in mandamus actions by persons requesting that their names be placed on the ballot unless the relator has shown that he is eligible and entitled to have his name placed on the ballot. See State ex rel. Dodd v. Dye, 163 S.W.2d 1055 (Mo.App. 1942); State ex rel. Christian v. Lawry, 405 S.W.2d 729 (Mo.App. 1966); and State ex rel. Scott v. Dircks, 111 S.W. 1 (Mo. 1908).

In other states the courts have held that while the election officers' functions are generally ministerial, the writ of mandamus will be denied when the relator is not entitled to have his name placed on the ballot because he is not eligible for the office. Application of Lindgren, 113 N.E. 353 (N.Y.App. 1921); Davis v. Crawford, 116 So. 41 (Fla.Sup. 1928).

Honorable Rupert G. Usrey

Our conclusion then is that the clerk may refuse to place the name of a candidate he believes to be ineligible on the ballot and the question of eligibility will then be determined by the courts if an action is brought to require the clerk to place the candidate's name on the ballot.

Your second question asks whether a person may maintain his home and family in one township and his legal or voting residence in another township and thereby be a qualified elector in a township other than that in which he lives. We also understand from you that in the circumstances presented there is no evidence to indicate that the person actually has a legal residence in the township in which he has been voting and for which he has filed his declaration of candidacy.

Of course, a person cannot have a separate residence only for voting purposes. Hall v. Schoenecke, 31 S.W. 97 (Mo. 1895). However the legal questions in determining residency are numerous as indicated by the holding of the Springfield Court of Appeals in Clarkson v. MFA Mutual Insurance Company, 413 S.W.2d 10 (1967), quoted at length in our enclosed Opinion No. 153, dated February 19, 1971, to Heckemeyer. See State ex inf. McKittrick v. Jones, 185 S.W.2d 17 (Mo. 1945). We also enclose Opinion No. 387, dated September 3, 1971, to Broomfield and Opinion No. 168, dated August 7, 1969 to Gum, relative to this question.

In direct answer to your second question, if it is determined that a person is not a bona fide resident of the township at the time he files his declaration he is not eligible to have his name printed on the ballot. Since such a determination would controvert the declaration of residence and of elector qualification (see form of declaration, Section 120.340, RSMo 1969) it obviously gives rise to an actual contest of the factual situation which we are not able to decide. In this respect we refer you to page 5 of our Opinion No. 387, 1971, wherein we stated that, generally speaking, a person resides where his family permanently resides, but that under the Clarkson holding the residence of the family is not conclusive. How the clerk acts in any particular case is a matter to be determined by the clerk after consideration of all the facts involved.

CONCLUSION

It is the opinion of this office that a county clerk may refuse to place the name of a candidate he believes to be ineligible on the ballot and his action is subject to review by the courts. A person cannot have a residence for voting purposes only which is separate from his legal residence.

Honorable Rupert G. Usrey

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 153
2/19/71, Heckemeyer

Op. No. 387
9/3/71, Broomfield

Op. No. 168
8/7/69, Gum

March 17, 1972

OPINION LETTER NO. 88

Answer by Letter - Klaffenbach

Honorable Donald J. Gralike
State Representative, District 49
Room 301 Capitol Building
Jefferson City, Missouri 65101



Dear Representative Gralike:

This letter is in response to your opinion request in which you ask:

"If in the event the Treasurer of the county committee is not available is it permissible to file in cash or by cashier check along with declaration of candidacy with the Board of Election Commissioners?"

Subsection 3 of Section 120.780, RSMo 1969 to which you refer provides:

"Any qualified elector in the township or ward may have his or her name printed on the primary ballot or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman, by paying a filing fee to the treasurer of the county committee and by filing a receipt showing the payment of the filing fee and a declaration of candidacy with the board of election commissioners or county clerk as is required by section 120.340. In all counties of the first class containing a city which now has or may hereafter have a population of more than three hundred and fifty thousand inhabitants, the fee is twenty-five dollars, and in all other counties of the first class the fee is one hundred dollars."

Honorable Donald J. Gralike

You further advise that the problem is centered about the treasurer's not being readily available to the candidates.

We are of the view that your question is answered by our Opinions No. 37, dated June 4, 1954 to Hamilton and No. 100, dated February 13, 1964 to Schellhorn, which are self-explanatory and which are enclosed.

Although these opinions which interpreted provisions similar to the provision you question hold that the procedure prescribed is not mandatory, we wish to caution you that the cases relied on, State ex rel. Haller v. Arnold, 210 S.W. 374 (Mo. 1919) and State ex rel. Neu v. Waechter, 58 S.W.2d 971 (Mo. 1933) noted that the candidate was not at fault and that such a provision would be unconstitutional if it required simultaneous filing of the receipt and declaration in all circumstances.

There is no authority for payment of the prescribed fee to the board of election commissioners.

Thus we conclude that while a deviation from simultaneous filing may be justified in some instances we are not free to hold generally that the procedure prescribed in Section 120.780 may be casually ignored. If an alternative procedure is desired it should be provided by amendment to such section.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 37
6/4/54, Hamilton

Op. No. 100
2/13/64, Schellhorn

INSURANCE:

Neither Chapter 382, RSMo 1969, the Insurance Holding Companies Act, nor Section 375.320 of the Revised Statutes of Missouri 1969, prohibits a domestic insurer from operating a subsidiary which it acquired on March 23, 1971, and which subsidiary was organized and incorporated for the purpose of engaging generally in the automobile salvage business to dispose of salvage obtained by the insurer in the ordinary course of its insurance business.

OPINION NO. 89

June 2, 1972

Mr. William Y. McCaskill
Superintendent
Division of Insurance
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. McCaskill:

This opinion is in response to your request for an opinion from the office of the Attorney General with respect to the following inquiry:

"Is the ownership by an insurance company organized under the laws of the State of Missouri of the stock of a business corporation organized and incorporated on March 23, 1971, under Chapter 351, R.S.Mo., for the purpose of engaging generally in the automobile salvage business prohibited by the provisions of Senate Bill 101 enacted by the 76th General Assembly (now Chapter 382, R.S.Mo.) or Section 375.320, R.S.Mo.?"

The business of insurance is a highly regulated activity within the state of Missouri. Chapters 374, 375, 376, 377, 378, 379, 380 and 382 of the Revised Statutes of Missouri are designed to regulate the insurance business. This is in accordance with the long standing Missouri authority that "... the insurance business so affects the public interest as to require its regulation by the state and to hold all who engage therein to strict account. . . ." Clay v. Eagle Reciprocal Exchange, 368 S.W.2d 344, 351 (Mo. 1963). See also, State ex rel. Lucas v. Blair, 144 S.W.2d 106, 109 (Mo. banc 1940), cert. denied 312 U.S. 700, 61 S.Ct. 741, 85 L.Ed. 1134; State ex rel. Missouri State Life Ins. Co. v. Hall, 52 S.W.2d 174, 177 (Mo. banc 1932); and State ex rel. Mackey v. Hyde, 286 S.W.

Mr. William Y. McCaskill

363, 365 (Mo. banc 1926). Your opinion request inquires whether two specific portions of the Missouri statutory law regulating insurance companies (Chapter 382 and Section 375.320) prohibit the ownership by an insurance company of stock in a business corporation engaged in the automobile salvage business.

The pertinent portion of Senate Bill No. 101 enacted by the 76th General Assembly is now Section 382.020, RSMo Supp. 1971. This section is part of the new Insurance Holding Companies Act designated Chapter 382, Revised Statutes of Missouri. The relevant portions of Section 382.020, RSMo Supp., follow:

"1. Any domestic insurer, either by itself or in cooperation with one or more persons, may invest in, otherwise acquire or operate one or more subsidiaries engaged or registered to engage in one or more of the following businesses:

* * *

(3) . . . provided, however, that such services shall not include services of salvage of motor vehicles, the mechanical, body or other repair of motor vehicles and the towing or retrieval of motor vehicles;

* * *

"2. . . . Nothing in sections 382.010 to 382.300 shall be deemed to limit the powers of a domestic insurance company existing prior to September 28, 1971."

As is apparent from the above-quoted language, the effective date of Chapter 382 was September 28, 1971. The question you pose states that a domestic insurance company has acquired an automobile salvage subsidiary as of March 23, 1971, or prior to the effective date of Chapter 382.

Section 382.020.1(3) explicitly prohibits a domestic insurance company from operating or acquiring a subsidiary engaged in the automobile salvage business. Subsection 2 of such section, however, constitutes a grandfather clause to the effect that the Insurance Holding Companies Act should not be construed to restrict the powers of insurance companies existing prior to the effective date of said act, September 28, 1971. If, therefore, an insurance company existing prior to the effective date of the Insurance Holding Companies Act had the power to acquire or operate a subsidiary engaged in the

Mr. William Y. McCaskill

automobile salvage business, then the grandfather clause referred to above explicitly exempts said company from the prohibition against operating or acquiring a subsidiary engaged in such business. As a result, the resolution of your inquiry depends not on the Insurance Holding Companies Act but upon the disposition of the issue whether domestic insurance companies existing prior to the effective date of that act had the power to operate or acquire subsidiaries engaged in the business of automobile salvage.

Your opinion request further inquires whether Section 375.320, RSMo 1969, prohibits an insurance company from owning stock in an auto salvage business. That section states:

"No insurance company formed under the laws of this state shall, directly or indirectly, deal or trade in any goods, wares, merchandise or other commodities whatsoever, except such as may be incident to and necessary in connection with the ownership and operation of property held under the provisions of sections 375.330 and 375.340."

The sections referred to in the above statute are not relevant to your inquiry as they regard the purchase, ownership, sale and exchange of real estate.

The question upon which the ultimate resolution of your inquiry must depend is whether the ownership of stock in an auto salvage business constitutes unauthorized dealing or trading "in any goods, wares, merchandise or other commodities." In paragraph 4 of your opinion request, you have indicated that the specific automobile salvage corporation prompting your inquiry is ". . . a wholly-owned subsidiary of the MFA Insurance Companies, and its sole operation is the storage, handling, dismantling, and sale of vehicles acquired by the insurance companies in carrying out their policy contract obligations." (Emphasis ours). There are no Missouri cases, nor are there any prior Attorney General opinions, which construe the language of Section 375.320. Likewise, no other statutes are available to assist us in the determination of whether the acquisition of stock by an insurance company in an auto salvage business is prohibited. Sections 375.330 and 375.340, RSMo 1969, allow an insurance company to purchase, own, sell and exchange real estate in certain specified instances. Section 375.355, RSMo 1969, permits one insurance company to acquire control of another with authorization by the Superintendent of Insurance. No other statute, prior to the effective date of the Insurance Holding Companies Act, expressly granted the power to an insurance company to participate in a business other than that of insurance or to acquire an interest in a corporation participating in another business. However, we

Mr. William Y. McCaskill

have concluded that the implied powers of an insurance company authorize the acquisition of an automobile salvage corporation which disposes solely of automobile salvage acquired in the ordinary course of the insurance business.

The leading Missouri case regarding the implied powers of corporations is Mutual Bank & Trust Co. v. Shaffner, 248 S.W.2d 585 (Mo. 1952). That case provides that:

" . . . ' . . . a corporation possesses only such powers as are expressly or fairly implied in the statute by or under which it is created' . . . implied powers 'are defined to be those possessed by a corporation, not indispensably necessary to carry into effect others expressly granted, and comprise all that are appropriate, convenient, and suitable for that purpose, including as an incidental right a reasonable choice of the means to be employed in putting into practical effect this class of powers.' . . ."
Id. at 589

The above-quoted case held that it was within the implied powers of a bank to pay premiums on group life insurance policies designed to pay the difference between the face amount of a savings certificate issued a purchaser by the bank and the amount contributed toward the purchase price at the time of the purchaser's death. In the case of Fleckner v. The Bank of the United States, 21 U.S. (8 Wheat.) 338, 5 L.Ed. 631 (1823), the United States Supreme Court construed language such as that used in Section 375.320. That case involved the purchase by a bank of a promissory note. The court construed a prohibition against merchandising as follows:

" . . . It aims to interdict the bank from doing the ordinary business of a trader or merchant, in buying and selling goods, etc., for profit, and uses the words 'deal' and 'trade,' in contradistinction to purchases, made for the accommodation or use of the bank, or resulting from its ordinary banking operations. . . ."
Id. at 634

We believe that an insurance company has the implied power, either by itself or through a subsidiary corporation, to obtain the best return it can on the goods or commodities it has been forced to take as part of its business of conducting an insurance operation and settling claims. An insurance company, which writes automobile liability or automobile collision insurance policies,

Mr. William Y. McCaskill

can dispose of automobile salvage acquired in the ordinary course of business from either their policyholders or from claimants against those they insure. As stated in Mutual Bank & Trust Co. v. Shaffner, supra, at 589, in disposing of said salvage, an insurance company has " . . . ' . . . as an incidental right a reasonable choice of the means to be employed in putting into practical effect this class of powers.' . . ." We do not believe that Section 375.320 prohibits an insurance company from acquiring ownership of stock in an automobile salvage corporation.

Your opinion request was limited to whether Senate Bill No. 101 enacted by the 76th General Assembly or Section 375.320, RSMo 1969, prohibits an insurance company from operating a subsidiary engaged in the automobile salvage business which it acquired on March 23, 1971. As stated above, we have concluded that neither of those statutory provisions precludes an insurance company from operating such a subsidiary. It should not be implied from this opinion that a subsidiary corporation of an insurance company has any further powers than those expressly discussed in this opinion and in your opinion request. That is, an insurance company may operate a subsidiary, the stock in which was purchased by said insurance company on March 23, 1971, which subsidiary is engaged in the limited commercial enterprise of disposing of vehicles which the parent insurance company has acquired in connection with its insurance business. The disposition of such vehicles by this subsidiary can be by means of an automobile salvage operation.

CONCLUSION

It is, therefore, the opinion of this office that neither Chapter 382, RSMo 1969, the Insurance Holding Companies Act, nor Section 375.320 of the Revised Statutes of Missouri 1969, prohibits a domestic insurer from operating a subsidiary which it acquired on March 23, 1971, and which subsidiary was organized and incorporated for the purpose of engaging generally in the automobile salvage business to dispose of salvage obtained by the insurer in the ordinary course of its insurance business.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Michael L. Boicourt.

Yours very truly,



JOHN C. DANFORTH
Attorney General

March 17, 1972

OPINION LETTER NO. 90
Answer by Letter - Cole

Honorable Norman L. Merrell
Missouri Senate
Room 431 Capitol Building
Jefferson City, Missouri 65101



Dear Senator Merrell:

This is in answer to your request for an opinion asking whether a fourth class city in Missouri may issue general obligation bonds for the purpose of financing municipal litigation concerning conservation of the potential water supply of such city.

We are enclosing Opinion No. 3, rendered on January 19, 1972, which we believe answers your question. That opinion holds that municipal library districts have the authority to issue general obligation bonds for the purpose of constructing library buildings and facilities within their districts even though there is no statute providing for the issuance of bonds by such districts.

Article VI, Section 26(b) of the Missouri Constitution, quoted on page two of that opinion provides that any city can become indebted in an amount not to exceed five per cent of the value of taxable tangible property in the city by vote of two-thirds of the voting electorate.

The attached opinion notes that in previous cases, the Missouri Supreme Court has considered whether the purposes for which indebtedness was to be incurred were public purposes. Our judgment is that Section 79.390, RSMo, giving cities of the fourth class power to "establish, make and regulate public wells, cisterns and reservoirs of water and provide for filling the same" would make such a city's expenditure on litigation to conserve potential water supplies a public purpose as called for in these cases.

Honorable Norman L. Merrell

It is consequently our view that a city of the fourth class in Missouri can call an election and upon assent of two-thirds of the qualified electors of such city voting thereon issue general obligation bonds for the purpose of financing litigation in which the city is engaged, including attorney fees and fees of expert investigation and testing, where the litigation concerns conservation of potential water supply of said city.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 3
1/19/72, O'Halloran

June 7, 1972

OPINION LETTER NO. 92
Answer by letter-Wood

Mr. Robert E. Myers
State Land Surveyor
State Land Survey Authority
P. O. Box 1158
Rolla, Missouri 65401



Dear Mr. Myers:

You have requested my legal opinion as to whether a certain definition of the term "land surveying" approved by the Board of Direction of the American Society of Civil Engineers conforms to the meaning of this term as it is used in Section 60.530, RSMo 1969.

The definition referred to and as set forth in your request is as follows:

"Land Surveying includes the determination of the location of land boundaries and land boundary corners, the preparation of maps showing the plan figures formed by the boundaries, and the determination of the areas of land contained therein; the division of land into smaller tracts, including the layout of roads and streets and rights-of-way for same to give required access, and the preparation of plats or maps of land subdivisions; and the preparation and interpretation of land descriptions for incorporation in deeds, leases, and other related documents."

Section 60.530, RSMo, the statute in question, reads:

"The state land surveyor shall, under guidance of the authority, carry out the routine functions and duties of the authority, as prescribed

Mr. Robert E. Myers

in sections 60.500 to 60.610. He shall, whenever practical, cause all land surveys, except geodetic surveys, to be executed, under his direction by the registered county surveyor or a local registered land surveyor when no registered county surveyor exists. He shall perform such other work and acts as shall, in the judgment of the authority, be necessary and proper to carry out the objectives of sections 60.500 to 60.610 and, within the limits of appropriations made therefor and subject to the approval of the authority, employ and fix the compensation of such additional employees as may be necessary to carry out the provisions of sections 60.500 to 60.610." (emphasis added)

This statute, part of the law establishing the State Land Survey Authority (Sections 60.500 to 60.610, RSMo 1969; L. Mo. 1969, page 123) was enacted at the same session of the General Assembly as a repeal and reenactment of the law governing the practices of architects, professional engineers and land surveyors (Chapter 327, RSMo 1969; L. Mo. 1969, page 451). Prior to such repeal and reenactment of the latter law, it contained the following definition:

"'Land surveying' means the surveying and measuring of the area of any portion of the earth's surface; locating and measuring the lengths and directions of the boundaries of land, and the contour of the surface thereof; and the plotting of lands, and subdivisions thereof in this state, for compensation in any form or manner;" (Section 344.010(1), RSMo 1959; L. Mo. 1955, page 633)

Upon the 1969 repeal and reenactment, this definition became the following:

"Any person practices in Missouri as a land surveyor who renders or offers to render or holds himself out as willing or able to render any service comprising the determination of the location of land boundaries and land boundary corners, the preparation of maps showing the shape and area of tracts of land and their subdivisions into smaller tracts and showing access thereto, and the preparation of official plats, or maps, . . ." (Section 327.272, RSMo 1969)

Mr. Robert E. Myers

It would appear that the new definition is more restrictive than the old definition and that it is also more compatible with the Authority's proposed definition of "land surveying" to implement Section 60.530, RSMo. In fact, because of the close similarity of the definition in Section 327.272, RSMo, and the proposed definition, we feel little hesitancy in stating our opinion that the proposed definition conforms to the meaning of "land surveys" as it is used in Section 60.530, RSMo.

Yours very truly,

JOHN C. DANFORTH
Attorney General

TAXATION:
ELECTIONS:
COUNTY LIBRARIES:

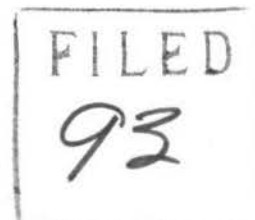
After a county library district has been in existence for five years there is no limitation on the frequency with which the pro-

position to reconsider a library district's tax rate can be submitted to the people at the annual election. Said annual election is the annual school election held on the first Tuesday in April of each year.

OPINION NO. 93

May 19, 1972

Mr. Charles O'Halloran
State Librarian
Missouri State Library
308 East High Street
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This is in response to your request for an opinion on a question of whether or not there is a limit fixed by statute as to the frequency with which the proposition to reconsider the tax to support a county library district may be voted on by the people at annual elections when the library district is over five years old. You also ask that we issue an opinion as to the meaning of the words "any annual election" as that term is used with reference to county library districts.

In answer to your first question, Section 182.020.3, RSMo 1969, provides:

"The tax may be reconsidered whenever the qualified electors of any county library district shall so determine by a majority vote given at any annual election held therein on such propositions after petition, order of the court, and notice of the election and of the purpose thereof, first having been made, filed, and given, as in the case of establishing such county library district. At least five years must elapse after the county library district has been established and a tax therefor has been levied before an election may be held on a proposition to reconsider the tax."

Mr. Charles O'Halloran

While that section specifically prohibits reconsideration of the county library district tax within five years after the establishment of the district, it places no limitations on subsequent reconsideration. Therefore, the tax rate may be reconsidered at any annual election held after the library district has been in existence for five years without any requirement as to the period of time which must pass since the tax was reconsidered at a previous annual election.

With respect to your second question, the term "annual election," as it is used in the sections referring to county library districts, refers to the annual election for directors of school districts held each year on the first Tuesday in April. This is indicated by the fact that Section 182.010, RSMo 1969, makes reference to the annual school elections as provided for in Section 179.020, RSMo 1969; and Section 179.020 refers to the annual school meeting or election. Such meetings or elections are provided for on the first Tuesday in April by Sections 162.741 and 162.341, RSMo 1969.

CONCLUSION

It is the opinion of this office that after a county library district has been in existence for five years there is no limitation on the frequency with which the proposition to reconsider a library district's tax rate can be submitted to the people at the annual election. Said annual election is the annual school election held on the first Tuesday in April of each year.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

May 16, 1972

OPINION LETTER NO. 94
Answer by Letter - Ruger

Honorable Hayden Morgan
State Representative, District 112
Rural Route 2
Nevada, Missouri 64772



Dear Representative Morgan:

In your opinion request, you asked the following questions:

- "a. To what extent are the policies set forth in Title III of the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, 84 Stat. 1894, applicable to right-of-way acquisitions for federal aid highway projects by the State Highway Commission?
- "b. If such policies are not so fully applicable to federal aid highway projects of the State Highway Commission, for what provisions would implementing legislation be required?
- "c. On a federal aid highway project of the State Highway Commission where real property is being acquired for right of way, and in view of the said Act, is it proper for the State Highway Commission to acquire the land alone without also acquiring an equal interest in the structures placed thereon by a tenant (assuming no consent to the acquisition of the land alone)?
- "d. Is it proper for the State Highway Commission with respect to a federal aid highway project, and in light of the aforesaid

Honorable Hayden Morgan

federal act, to refuse to settle with the fee owner of property lying within the right of way to be acquired when --

(a) the fee owner is willing to accept in payment for his interest an amount within the Commission's appraised fair market value of his interest,

(b) the Commission and a tenant on the property are in disagreement as to the compensation due the tenant for his interest or interests, and

(c) the Commission will not settle with the fee owner, but instead threatens him with condemnation proceedings, unless the fee owner obtains or coerces the tenant into agreeing without a court determination to the terms unilaterally set by the Commission?"

The Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act can be found at 42 U.S.C.A., Sections 4601 through 4651 (Supp. 1972). This Act applies primarily to land acquisition by federal agencies. However, it does contain the following provision at 42 U.S.C.A., Section 4630 (Supp. 1972):

"Notwithstanding any other law, the head of a Federal agency shall not approve any grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after January 2, 1971, unless he receives satisfactory assurances from such State agency that --

(1) fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a Federal agency under sections 4622, 4623, and 4624 of this title;

(2) relocation assistance programs offering the services described in section 4625 of this title shall be provided to such displaced persons;

Honorable Hayden Morgan

(3) within a reasonable period of time prior to displacement, decent, safe, and sanitary replacement dwellings will be available to displaced persons in accordance with section 4625(c) (3) of this title."

The legislative history and purpose of this law is discussed in 3 U. S. Code Congressional and Administrative News 5864 (1970).

In answer to question "a" of your opinion request, it is clear from the above-quoted provision of the Relocation Assistance Act that, in a federally assisted project conducted by a state agency, the applicability of the Act is expressly governed by the language of 42 U.S.C.A., Section 4630 (Supp. 1972).

By statute, the Missouri Highway Commission has been given the authority and direction to comply with federal legislation providing for the distribution and expenditure of funds by the United States for highway construction. Section 226.150, RSMo 1969. Thus, in answer to your second question, no further legislation is necessary to authorize the State Highway Commission to comply with the directives of the Relocation Assistance Act.

Your third question, in which you ask whether the State Highway Commission may acquire a particular tract without also acquiring an equal interest in the structures placed thereon by a tenant, in light of the Relocation Assistance Act, cannot be answered definitively. In general, the terms of the Act provide that financial assistance is to be granted a person displaced from the operation of a business on the acquired tract. On the other hand, the legislative history of the Act, 3 U. S. Code Congressional and Administrative News 5856 (1970) indicates that where the structures on the land taken are in disrepair or obsolete, compensation received for them would be minimal, if any compensation at all were to be paid for the structures themselves. Thus, each factual situation would require a different response. If the property were to be acquired by condemnation, the courts of Missouri have established the principle that the compensation is paid into court for the property itself and then, upon motion, apportioned to the persons having property interests in the land, in accordance with the value of those interests. See e.g., State ex rel. State Highway Commission v. Conrad, 310 S.W.2d 871 (Mo. 1958); City of St. Louis v. Rossi, 64 S.W.2d 600 (Mo. 1933); State ex rel. McCaskill v. Hall, 28 S.W.2d 80 (Mo. banc 1930); cf. Union Electric Co. v. Slay Bulk Terminals, Inc. 475 S.W.2d 136 (Mo.App. 1972).

Furthermore, it would be improper for this office to render a definitive answer to your question "c" because this inquiry

Honorable Hayden Morgan

involves questions of fact that are currently being litigated in the United States District Court for the Western District of Missouri, Central Division, in the case styled Glenn L. Whitmann, et al. v. State Highway Commission, et al. (No. 1793). This lawsuit raises the question of the applicability of the Relocation Assistance Act and State Highway Commission policies implementing this Act as they specifically apply to the compensation for billboard structures located upon lands acquired for highway construction purposes.

The Federal Relocation Assistance Act does not govern the questions asked in question "d" of your request. The State Highway Commission has established procedures applicable to land acquisition. However, any alleged unauthorized or improper action by a state agency can be resolved only within the context of litigation wherein the particular factual issues are fully developed.

It is the opinion of this office that the Uniform Relocation Assistance Act, 42 U.S.C.A., Sections 4601 et seq. (Supp. 1972), is applicable to right-of-way acquisitions for federally assisted highway projects of the State Highway Commission. No implementing legislation is required to make this federal statute applicable. The federal legislation does not establish specific policies for land acquisition. The outcome of pending litigation will determine the propriety of certain land acquisition practices allegedly employed by the State Highway Commission.

Very truly yours,

JOHN C. DANFORTH
Attorney General

LAND SURVEYORS:
COUNTY SUPVEYOR:
DEPUTY COUNTY SURVEYOR:

1. Only a person duly registered as a land surveyor under Chapter 327, RSMo 1969, is qualified to be elected to the office of county surveyor. 2. County surveyors who were qualified for the office when elected continue to hold the office for the remainder of their terms. 3. County surveyors have authority to appoint a duly registered land surveyor as a deputy to perform work as a land surveyor. 4. The state land surveyor may in his discretion require land surveys to be made by a local registered land surveyor when no registered county surveyor exists. 5. The only compensation the county surveyor in third and fourth class counties is entitled to receive for his services, whether the work is performed by him or his deputy, is the compensation provided by statute for the county surveyor. Any compensation to the deputy for his services must come from the county surveyor.

OPINION NO. 96

May 23, 1972

Mr. Robert E. Myers
State Land Surveyor
State Land Survey Authority
P. O. Box 1158
Rolla, Missouri 65401



Dear Mr. Myers:

This is in response to your request for an opinion from this office in part as follows:

"The Attorney General's Opinion Number 405, November 15, 1971 stated that 'a duly elected county surveyor cannot practice as a land surveyor in this state as defined in Section 327.272, RSMo 1969, unless he has been duly registered as a land surveyor under Chapter 327, RSMo 1969'. Section 60.010 RSMo 1969 states, 'the qualified voters of each county of this state in classes two, three and four shall elect some suitable person as a county surveyor'. Does the qualification 'some suitable person' now mean a land surveyor registered under provisions of Chapter 327, RSMo 1969?

"In the event that the elected county surveyor is not registered as a land surveyor under Chapter 327, RSMo 1969 may the county surveyor appoint a Deputy that is registered as

Mr. Robert E. Myers

a land surveyor in order to practice land surveying?

"The duties of the State Land Surveyor are given in Section 60.530, RSMo 1969 which states that 'he shall, whenever practical, cause all land surveys, except geodetic surveys, to be executed, under his direction by the registered county surveyor or a local registered land surveyor when no registered county surveyor exists.'

"In the case of the unregistered county surveyor and registered deputy county surveyor is the State Land Surveyor bound to cause all land surveys to be executed by the deputy as if he were the 'registered county surveyor' called for by statute. Also does the county surveyor statutory fee schedule apply to said deputy." (Underscoring theirs)

You further state that in 1972 there are seventy-one county surveyors in Missouri. Fifteen of these surveyors are not now registered land surveyors according to Chapter 327, RSMo 1969. You further state that at present several of these non-registered county surveyors have appointed a deputy county surveyor who is a registered land surveyor and who actually surveys and signs and seals all such surveys for the county surveyor. You further state that all county surveyors are to be elected this year and you want to know whether a person who is not a duly registered land surveyor in the State of Missouri is qualified to be elected to the office as county surveyor.

Section 60.010, RSMo 1969, provides for the election of a county surveyor in class two, three and four counties, as follows:

"At the regular general election in the year 1948, and every four years thereafter, the qualified voters of each county of this state in classes two, three and four shall elect some suitable person as county surveyor, who shall hold his office for four years and until his successor is duly elected, commissioned and qualified."

On November 15, 1971, in Opinion No. 405, this office ruled that a duly elected county surveyor cannot practice as a land surveyor in this state unless he has been duly registered as a land surveyor under Chapter 327, RSMo.

Mr. Robert E. Myers

We shall consider your questions in the order as submitted.

Section 60.010, RSMo, provides for the election of a "suitable person" as county surveyor. The question is who is a suitable person to be elected county surveyor under this statute.

It is our view the term "suitable person" as used in this statute as applied to the qualifications for public office should be considered in the sense of being fully capable of adequately rendering all the services, fitness or capability of performing the duties of the office. 67 C.J.S., Officers, paragraph 11. The term "suitable person" is defined in Words and Phrases, Volume 40A as a proper and competent person.

In regard to the duties of the county surveyor, Section 60.120, RSMo 1969, provides that the county surveyor shall, within ten days, when called upon, survey any tract of land or town lot lying within his county at the expense of the person demanding the same. Section 60.170, RSMo 1969, requires the county surveyor to execute all orders from a court of record for surveying any tract of land the title to which is in dispute before such court. Section 60.150, RSMo 1969, provides no surveys or resurvey made by any person except that of the county surveyor shall be considered as legal evidence in any court of this state, except such surveys as are made by the authority of the United States or by mutual consent of the parties.

Considering these duties as required by statute of a county surveyor, it is our view that unless the person is capable of performing these duties such person is not qualified for such office and, therefore, is not qualified or eligible to be elected as a county surveyor in class two, three and four counties in this state at the present time.

The question arises about the status of county surveyors who were elected to office prior to the enactment of Section 327.272, RSMo 1969, which provides that no duly elected county surveyor shall practice as a land surveyor in this state unless duly registered as a land surveyor in this state. This statute was enacted in 1969.

It is our view that a duly elected county surveyor elected to office prior to 1969, who was qualified at that time for the office of county surveyor, continues to legally hold the office during the remainder of his term.

The general principles of law concerning a vacancy in public office and when it occurs is stated in 67 C.J.S., Officers, paragraph 50 in part as follows:

Mr. Robert E. Myers

" . . . The law abhors vacancies in public offices, and courts generally indulge in a strong presumption against a legislative intent to create, by statute, a condition which may result in an executive or administrative office becoming, for any period of time, wholly vacant and unoccupied by one lawfully authorized to exercise its functions. . . ."

In *State ex inf. Lamkin ex rel. Harrison v. Tennyson*, 151 S.W.2d 1090 (Mo. banc 1941) involved a quo warranto proceeding to determine the right of a county recorder to hold the office of recorder when a change in population resulted in separating the office of circuit clerk-recorder. In holding the circuit clerk-recorder continued to hold both offices until the next election, the court stated, l.c. 1091:

"In this connection it should be noted that the courts indulge a strong presumption against a legislative intent to create a condition that might result in a vacancy in public office. . . ."

In *State ex inf. McKittrick v. Wilson*, 166 S.W.2d 499 (Mo. banc 1942), the Supreme Court in quo warranto proceedings had before it the question of whether the circuit clerk had forfeited his office while in the United States Army on the theory that he was unable to devote his time to the office and as a result had forfeited the office. In discussing this question, the court stated, l.c. 501:

" . . . Verily a public office is held on the implied condition that the officer will perform the duties belonging to it. However, Mechem in his work on Public Officers points out that generally it is a willful refusal to perform the duties of an office which works a forfeiture so that a judgment of ouster is necessary. The statutes of some states specifically require such a judgment."

It is our view that county surveyors who were qualified for the office of county surveyor when elected qualify to remain in office during the remainder of the term. That it was not the intention of the legislature, when it enacted the statute requiring county surveyors to be registered land surveyors in order to perform the duties of land surveying, to create a vacancy in the office of county surveyor or to create a condition that would result in a forfeiture of the office. As hereinafter discussed, it is

Mr. Robert E. Myers

our view that they may appoint deputy surveyors who are qualified to perform the functions and it is not necessary for the office to be considered vacant.

You inquire about the authority of the county surveyor to appoint a duly registered land surveyor in this state as a deputy to perform the duties of the county surveyor in making surveys and to sign and seal all such surveys.

Section 60.090, RSMo 1969, provides:

"Deputies may be appointed by any surveyor who, before they proceed to discharge their duties, shall take an oath well, truly and faithfully to discharge the duties of deputy surveyors."

General principles of law concerning the powers and authority of deputy public officers is stated in 67 C.J.S., Officers, paragraph 151 in part as follows:

"Without statutory authority, deputies or subordinate officials have no power with respect to the duties of an office involving the exercise of judgment and discretion; nor may they, as a rule, without such authority, perform judicial or quasi-judicial duties conferred on their principals, and a deputy may not himself make or appoint a deputy. However, as a general rule under the statutes, a legally appointed deputy possesses the same powers as the officer whom he represents and may usually do every act which his principal may do, so that all ministerial duties pertaining to the office which the principal could perform may be performed by a deputy. When the law authorizes an officer to appoint a deputy without any express limitation on his power, the duties of the office may be performed by either, and a deputy may exercise any of the duties pertaining to the office, as the necessity of convenience of the public may demand their use, and this power may not be curtailed by the principal, unless the law expressly authorizes him to do so." (emphasis supplied)

We believe this principle of law should be and is followed in this state. *Small v. Field*, 102 Mo. 104 (1890); *State v. Carey*,

Mr. Robert E. Myers

318 Mo. 813 (1927). It is our view that a county surveyor may appoint a deputy who is duly registered as a land surveyor and otherwise qualified to perform the work as a surveyor and perform the duties of the county surveyor in the same manner as they are to be performed by the county surveyor.

Section 327.361, RSMo 1969, prohibits the filing or recording of certain documents not sealed and signed by a registered land surveyor. It provides as follows:

"1. It shall be unlawful for the recorder of deeds of any county, or the clerk of any city or town, or the clerk or other proper officer of any school, road, drainage, or levee district or other civil subdivision of this state, to file or record any map, plat, or survey which does not have impressed thereon, and affixed thereto, the personal seal and signature of the registered land surveyor by whom or under whose authority and supervision the map, plat or survey was prepared.

"2. Any person who violates the provisions of this section is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by confinement in the county jail for not less than thirty nor more than sixty days or by both such fine and confinement."

Under this statute for a map, plat or survey to be filed or recorded, it must have impressed thereon, and affixed thereto, the personal seal and signature of the registered land surveyor by whom or under whose authority and supervision the map, plat or survey was prepared. It does not prohibit the county surveyor from also signing the document or instrument. It is our opinion the document or instrument signed by the county surveyor, together with the seal and signature of the registered land surveyor who prepared or supervised the preparation of the document or instrument, complies with the provision of this statute and such document or instrument may be filed and recorded.

You refer to Section 60.530, RSMo 1969, which states that the state land surveyor ". . . shall, whenever practical, cause all land surveys, except geodetic surveys, to be executed, under his direction by the registered county surveyor or a local registered land surveyor when no registered county surveyor exists. . . ." and

Mr. Robert E. Myers

inquire whether the state land surveyor is bound to cause all land surveys to be executed by the deputy as if he were the registered county surveyor.

Section 60.530, RSMo, provides:

"The state land surveyor shall, under guidance of the authority, carry out the routine functions and duties of the authority, as prescribed in sections 60.500 to 60.610. He shall, whenever practical, cause all land surveys, except geodetic surveys, to be executed, under his direction by the registered county surveyor or a local registered land surveyor when no registered county surveyor exists. He shall perform such other work and acts as shall, in the judgment of the authority, be necessary and proper to carry out the objectives of sections 60.500 to 60.610 and, within the limits of appropriations made therefor and subject to the approval of the authority, employ and fix the compensation of such additional employees as may be necessary to carry out the provisions of sections 60.500 to 60.610." (emphasis added)

The above section provides that the state land surveyor shall, whenever practical, cause all land surveys, except geodetic surveys, be executed under his direction by the registered county surveyor or a local registered land surveyor when no registered county surveyor exists. It is our view under this statute it is a matter of discretion for the state land surveyor to determine when it is practical to have a local registered land surveyor do the work when no registered county surveyor exists. As heretofore stated, it is our view that a duly registered deputy land surveyor has authority to perform the duties of the county surveyor. This is true whether the county surveyor is or is not a registered land surveyor. When the county surveyor is not a registered land surveyor and does not have a deputy who is a registered land surveyor, the state land surveyor has authority under this statute to require a local registered land surveyor to perform the services.

You also inquire whether the statutory fee schedule that applies to the county surveyor applies to his deputy. Section 60.100, RSMo 1969, provides that in counties of the second class, the county surveyor may charge for his services such sum as may be agreed upon by such surveyor and the person employing him.

Section 60.110, RSMo 1969, provides that county surveyors in counties of the third and fourth class shall be allowed fees for

Mr. Robert E. Myers

their services, which statutes set out a schedule of fees for the services of the county surveyor.

The county surveyor is a public official. When a statute provides compensation to a public official in a particular mode or manner, the officer is confined to such manner and is entitled to no other or further compensation or to any different mode of requiring it. Public policy requires that a public officer be denied additional compensation for performing official duties. *Nodaway County v. Kidder*, 344 Mo. 795, 129 S.W.2d 857 (1939).

It is our opinion that county surveyors in counties of the third and fourth class are entitled to receive only fees as provided in Section 60.110, RSMo, for the performance of their services. That the county surveyor is entitled to the fees for the work performed by the deputies. That the deputy is not entitled to charge these fees but his compensation depends upon the terms of his employment by the county surveyor in class three and four counties to be paid by the county surveyor.

CONCLUSION

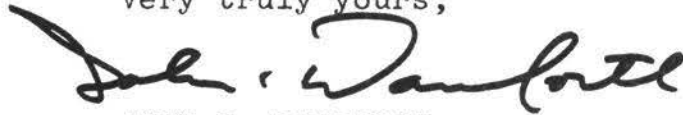
It is the opinion of this office that:

1. Only a person duly registered as a land surveyor under Chapter 327, RSMo 1969, is qualified to be elected to the office of county surveyor.
2. County surveyors who were qualified for the office when elected continue to hold the office for the remainder of their terms.
3. County surveyors have authority to appoint a duly registered land surveyor as a deputy to perform work as a land surveyor.
4. The state land surveyor may in his discretion require land surveys to be made by a local registered land surveyor when no registered county surveyor exists.
5. The only compensation the county surveyor in third and fourth class counties is entitled to receive for his services, whether the work is performed by him or his deputy, is the compensation provided by statute for the county surveyor. Any compensation to the deputy for his services must come from the county surveyor.

Mr. Robert E. Myers

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

May 16, 1972

OPINION LETTER NO. 97
Answer by letter-Wood

Mr. Robert E. Myers
State Land Surveyor
State Land Survey Authority
Post Office Box 1158
Rolla, Missouri 65401



Dear Mr. Myers:

This is in response to your request for my legal opinion on the following question:

Should the State Land Survey Authority, rather than the Secretary of State, have the actual custody of the field notes, plats and documents pertaining to the United States public land survey within Missouri?

The State Land Survey Authority was established in 1969 (L. Mo. 1969, p. 123; Sections 60.500-60.610, RSMo 1969) with, among others, the following functions, duties and responsibilities:

"The functions, duties and responsibilities of the authority shall be as follows:

(1) To restore, maintain, and preserve the land survey monuments, section corners, and quarter section corners established by the United States public land survey within Missouri, together with all pertinent field notes, plats and documents; and also to restore, establish, maintain, and preserve other boundary markers considered by the authority to be of importance, or otherwise established by law;

Mr. Robert E. Myers

* * *

(3) To establish, maintain, and provide safe storage facilities for a comprehensive system of recordation of information respecting all monuments established by the United States public land survey within this state, and such records as may be pertinent to the authority's establishment or maintenance of other land corners, Missouri state coordinate system stations and accessories, and monuments in general;

* * *

(6) To furnish, upon reasonable request and tender of the required fees therefor, certified copies of records created or maintained by the authority which, when certified by the state land surveyor or a designated assistant, shall be admissible in evidence in any court in this state, as the original record;"
(Section 60.510, RSMo 1969)

"The custody and ownership of the original United States public land survey corners and accessories, including all restoration and replacements thereof and all accessories, belonging to the state of Missouri is hereby transferred to the authority. . . ."
(Section 60.500, RSMo 1969)

". . . On the same basis of cost, this authority shall furnish [copies of] records within its custody to other agencies or departments of state, county or city, certifying them.

"2. The authority may produce, reproduce and sell maps, plats, reports, studies, and records, and shall fix the charge therefor. All income received shall be promptly deposited in the state treasury." (Section 60.590, subsections 1 and 2, RSMo 1969)

We believe the federal legislation by which the State of Missouri came into the custody of the field notes, plats, and records pertaining to the United States Government survey of the public lands within Missouri was as follows:

Mr. Robert E. Myers

"That it shall be the duty of the Secretary of the Treasury to take all the necessary measures for the completion of the surveys, in the several districts for which surveyors general have been, or may be, appointed, at the earliest periods compatible with the purposes contemplated by law; and whenever the surveys and records of any such district or State shall be completed, the surveyor general thereof shall be required to deliver over to the Secretary of State of the respective States, including such surveys, or such other officer as may be authorized to receive them, all the field notes, maps, records, and other papers, appertaining to land titles, within the same; and the office of surveyor general, in every such district, shall thereafter cease and be discontinued." (Act of June 12, 1840, c. 36; 5 Stat. 384; 43 U.S.C.A. §54; Emphasis added)

". . . the field notes, maps, records, and other papers mentioned in [the Act of June 12, 1840] . . . shall in no case hereafter be turned over to the authorities of any State, until such State shall have provided by law for the reception and safe keeping of the same as public records, and for the allowance of free access to the same by the authorities of the United States, as herein provided." (Act of June 22, 1853, c. 24; 10 Stat. 152; 43 U.S.C.A. §56)

"That whenever the Secretary of the Interior shall be of the opinion that the public interest no longer requires the continuance of the office of recorder of land titles in Missouri, he may close and discontinue the same; and all of the records, maps, plats, field-notes, books, papers, and everything else concerning, pertaining or belonging to said office of recorder, shall be delivered to the State of Missouri: Provided, however, That said State shall provide by law for the reception and safekeeping of said records, maps, plats, field-notes, books, papers, and everything else belonging to said office of recorder, as public records, . . ." (Act of June 6, 1874, c. 223; §3, 18 Stat. 62)

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"That the land offices at Chillicothe, Ohio, Indianapolis, Indiana, Springfield, Illinois, and the office of the recorder of land titles of the State of Missouri are hereby abolished, from and after the thirtieth day of September next and the Secretary of the Interior is hereby authorized to transfer to the States respectively aforesaid such of the transcripts, documents, and records of the offices aforesaid as may not be required for use of the United States, and as the States respectively in which said offices are situated may desire to preserve; . . ." (Act of July 31, 1876, c. 246; 19 Stat. 121)

The General Assembly of Missouri responded by enacting the following laws:

"The custodian of the archives, field notes, maps, plats, records and other papers of the late surveyor-general for the states of Illinois and Missouri is hereby directed to safely transmit, without delay, said archives, field-notes, maps, plats, records and other papers of said late surveyor-general for Illinois and Missouri; to the register of lands at the City of Jefferson."

"The register of lands of the state of Missouri is hereby directed to receive all said archives, field-notes, plats, records, maps and other papers from the custodian of said archives, and to keep the same for the convenience of the people of the state of Missouri, at his office in Jefferson City." (L. Mo. 1874, §§1 and 2; Sections 7473 and 7474, RSMo 1889)

"WHEREAS, The act of Congress of June 6, 1874, provides that all of the records, maps, plats, field notes, books, papers and everything else concerning, pertaining or belonging to the office of Recorder of Land Titles in Missouri, (usually called archives) of said office, be delivered to the State of Missouri, and the act of Congress of July the 31, 1866, also requires said archives, of said office to be delivered to the State; but both of said acts of Congress evidently require some indication

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on the part of the State that said archives are desired by the State; and,

"WHEREAS, Also, said archives consist of the original titles to a large portion of the most valuable lands in Missouri, and are, consequently of great importance to the people of the State, and all of said archives ought to be obtained by the State as soon as practicable, and forever kept by the State as public archives, for the use and benefit of all persons interested in said lands; therefore,

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. The United States, and the officers thereof, who have the possession or control of said archives, be and they are hereby most respectfully requested to deliver, as soon as practicable, to the State of Missouri, to any officer of said State lawfully authorized to receive the same, all of the records, maps, plats, field notes, books, papers and everything else concerning, pertaining or belonging to the said office of Recorder of Land Titles in Missouri, (usually called archives of said office.)

"Sec. 2. The Register of Lands of this State shall be and he is hereby authorized and required, as soon as practicable, to procure and receive said archives from the United States, or any officer or agent thereof; and said Register shall safely keep said archives in his office as public records, . . ." (L. Mo. 1877, p. 318; §§7477, 7478, RSMo 1889)

The office of Register of Lands was established by the General Assembly in 1841 (Act of 1841; see pp. 919-920, RSMo 1845), made a constitutional office in 1850 (Missouri Constitutional Amendments of 1850-1851), restored to a statutory basis in 1865 (Section 9, Article XIII, Constitution of Missouri, 1865), and finally abolished by the General Assembly in 1891 with a general transfer of duties to the Secretary of State (L. Mo. 1891, p. 181).

The statutory duties of the Register of Lands, prior to the abolition of his office, included in addition to those set forth in the statutes already quoted:

Mr. Robert E. Myers

(1) The receipt, filing and safekeeping in his office of all patents, books, records, and other papers and documents relating to lands donated to the state by the United States, or otherwise acquired by the state, previously in the custody of the Secretary of State, State Auditor, State Treasurer, and swamp land agent (Section 7472, RSMo 1889);

(2) Preparing, issuing, and recording saline and seminary land patents which had been executed by the Governor and the Secretary of State (Sections 6415, 6416, 6420, 6423, 6424, and 6425, RSMo 1889);

(3) Receiving abstracts or reports of school lands sold or selected by the county courts, and making out state patents for such lands (Sections 6434, 6435, 6459, and 6460, RSMo 1889);

(4) Furnishing lists and plats of swamp lands to the county clerks, serving as the state swamp land agent, and preparing, issuing and recording state swamp land patents to the various counties (Sections 6461, 6466, 6484, and 6510-6513, RSMo 1889)

The fees prescribed by statute for services performed by the Register of Lands included:

"The register of lands shall charge for performing the services hereinafter specified the following fees, to wit

For plat of survey. \$1.00

For plat of township. 2.50

For copy of field notes, for every
one hundred words and figures10"
(Section 5025, RSMo 1889)

The law abolishing the office of Register of Lands read:

"The secretary of state shall perform all the duties heretofore performed by and now required of the register of lands. On account of such additional duties imposed upon the secretary of

Mr. Robert E. Myers

state, he shall have one additional clerk."
(L. Mo. 1891, p. 181; Section 10021, RSMo 1899)

This statute was amended in 1945 to its present form:

"The secretary of state shall perform all the duties required by law to be performed on behalf of the state with respect to registration of lands, issuance of patents and other authentication of title to saline or swamp lands."
(L. Mo. 1945, p. 1724, §12999; Section 28.110, RSMo 1969)

Pursuant to the 1891 law, the Secretary of State assumed all responsibilities previously held by the Register of Lands with regard to:

(1) Saline and seminary lands (Sections 8148, 8149, 8150, 8154, 8158, and 8159, RSMo 1899; Section 28.110, RSMo 1969);

(2) School lands (Sections 8168, 8169, 8193, and 8194, RSMo 1899; Sections 166.120-166.130, RSMo 1959, repealed, L. Mo. 1963, p. 200);

(3) Swamp lands (Sections 8195, 8200, 8218, and 8244-8248, RSMo 1899; Sections 241.010-241.030 and 241.080-241.130, RSMo 1969)

The fees prescribed for services performed by the Register of Lands were similarly transferred to the Secretary of State (Section 3283, RSMo 1899; Section 28.160, RSMo 1969).

The statutes pertaining to the office of Register of Lands, and defining his responsibilities for maintaining and keeping the public land survey plats, field notes, maps, and records (Sections 7462-7478, RSMo 1889) were repealed in 1899 (L. Mo. 1899, p. 323). Since that time, and prior to enactment of the State Land Survey Authority Law in 1969, there were no laws expressly assigning to a particular state officer the responsibility for keeping and maintaining these public land survey documents.

Before the amendment of present Section 28.110, RSMo, in 1945, we believe it was clear that the Secretary of State had the responsibility for keeping and maintaining these public land survey documents, because such was the duty of the Register of Lands in 1891. However, as amended in 1945, the statute is much less clear on this point, to wit:

Mr. Robert E. Myers

"The secretary of state shall perform all the duties required by law to be performed on behalf of the state with respect to registration of lands, issuance of patents and other authentication of title to saline or swamp lands."
(Section 28.110, RSMo 1969)

We doubt that this statute was, after the 1945 amendment, authority for the Secretary of State's custody of the United States public land survey documents.

The statute prescribing the fees to be exacted by the Secretary of State for copies of survey and township plats, and the field notes, was perhaps some justification for the Secretary of State's continued custody after 1945 of the original plats and field notes of the public land survey (Section 28.160, RSMo 1969).

However, we suspect that the real basis for the Secretary of State's continued possession of the documents after 1945 was that there was no other department or agency authorized by law to receive and maintain them. The 1969 State Land Survey Authority Law is, in our opinion, such a law, and one that is definite and certain as to the custody of the original plats and field notes of the public land survey. It states that the Authority shall "... maintain, and preserve . . . the United States public land survey within Missouri, . . . pertinent field notes, plats and documents; . . ." (Section 60.510(1), RSMo 1969) and shall "... establish, maintain, and provide safe storage facilities for a comprehensive system of recordation of information respecting all monuments established by the United States public land survey within this state, . . ." (Emphasis added; Section 60.510(3), RSMo 1969). The Authority is further instructed to provide certified copies of all records it maintains upon payment of fees fixed by it for this service (Sections 60.510(6) and 60.590(2), RSMo 1969). We believe this law is, on the subject of the custody of the plats, field notes and documents of the United States public land survey in Missouri, complete in and of itself, irreconcilably inconsistent with and repugnant to any prior laws placing the custody of these documents elsewhere, and to this extent, an implied repeal of Sections 28.110 and 28.160, RSMo 1969, assuming that such statutes authorize the Secretary of State's custody of these documents.

"The repeal of a statute by implication is a matter of legislative intent, is not presumed, and is not favored. . . . Where two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the earlier one by implication, if they are not irreconcilably inconsistent,

Mr. Robert E. Myers

both must stand. . . . Repeals by implication usually arise where a later statute covers the whole subject matter of an earlier statute or where its provisions are so repugnant to the other as to make the two statutes irreconcilable. . . . Where there are two or more provisions relating to the same subject matter, they must, if reasonably possible, be construed so as to maintain the integrity of both. . . ." (Bullington v. State, 459 S.W.2d 334, 338 (Mo. 1970))

Since the 1969 law clearly designates the State Land Survey Authority as the repository of the "field notes, plats, and documents of the United States public land survey," we believe it operates as an exception to earlier laws, if any, placing these records in the custody of the Secretary of State. Accordingly, it is our opinion that the Secretary of State should transfer possession of these records to the State Land Survey Authority.

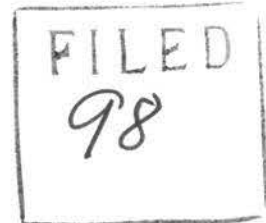
Yours very truly,

JOHN C. DANFORTH
Attorney General

March 3, 1972

OPINION LETTER NO. 98
Answer by Letter - Klaffenbach

Mr. Robert E. Myers
State Land Surveyor
Missouri State Land Survey Authority
Post Office Box 1158
Rolla, Missouri 65401



Dear Mr. Myers:

This letter is in response to your request for an opinion in which you ask:

"Section 60.590(1) RSMo 1969, states, 'On request of the authority or the state land surveyor, all city and county recorders of deeds, together with all departments, boards or agencies of state government, county, or city government, shall furnish to this authority or the state land surveyor certified copies of desired records which are in their custody. This service shall be free of cost when possible; otherwise it shall be at actual cost of reproduction of the records.'

"Some city and county recorders of deeds have, as authorized by section 109.120(3) RSMo 1969, recopied recorded documents on microfilm. Chapter 190.130 RSMo 1969, specifies that, 'Such photostatic copy, photograph, microphotograph or photographic film of the original records shall be deemed to be an original record for all purposes, and shall be admissible in evidence in all courts or administrative agencies. A facsimile, exemplification or certified copy thereof shall, for all purposes recited in sections 109.120 to 109.140, be deemed to be a transcript, exemplification or certified copy of the original.'

Mr. Robert E. Myers

"In the situation where the county recorder of deeds has made microfilm copies of the original documents and also retains the original documents, does the term 'certified copies of desired records' mean that the State Land Survey Authority can request either photocopies of the original documents or duplicate copies of the microfilm document?

"In the event that duplicate copies of the microfilm is requested, is the term 'actual cost of reproduction of the records' the cost to make the duplicate microfilm or the cost to make the original microfilm original?"

Section 60.590, RSMo 1969 to which you refer provides in full:

"On request of the authority or the state land surveyor, all city and county recorders of deeds, together with all departments, boards or agencies of state government, county, or city government, shall furnish to this authority or the state land surveyor certified copies of desired records which are in their custody. This service shall be free of cost when possible; otherwise it shall be at actual cost of reproduction of the records. On the same basis of cost, this authority shall furnish records within its custody to other agencies or departments of state, county or city, certifying them.

"The authority may produce, reproduce and sell maps, plats, reports, studies, and records, and shall fix the charge therefor. All income received shall be promptly deposited in the state treasury."

Also, as you have indicated Sections 109.120, RSMo 1969 et seq., authorize the reproduction of original records by recorders of deeds by photostatic, photographic, microphotographic, microfilm or similar mechanical process which produces a clear, accurate and permanent copy of the original and provide that such reproductions may be used as permanent records of the originals and shall be deemed to be original records for all purposes.

With respect to the meaning of the language "actual cost of reproduction of the records" Section 1.090, RSMo 1969 provides that:

Mr. Robert E. Myers

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

Thus, the plain meaning of "actual cost of reproduction" in our view means simply the cost of reproducing the records and where the records are being maintained by the processes authorized under Section 109.120, such cost does not include the original cost of reproducing such records but only the cost of duplication. The fact that the legislature provided that the service "shall be free of cost when possible" indicates, in our view, that costs to the Land Survey Authority are to be kept to a minimum.

In answer to your question concerning which documents should be duplicated where the county recorder has made microfilm copies of the original records but has retained the original records, it is our view that the reproduction procedure authorized by Section 109.120 was intended to eliminate the necessity of keeping voluminous original records, and when such reproductions are used as the original record by the recorder, the reproduction becomes the permanent record and the State Land Survey Authority would be entitled to duplicates of such reproductions properly certified and with the same effect as certified copies of the original under Section 109.130.

Very truly yours,

JOHN C. DANFORTH
Attorney General

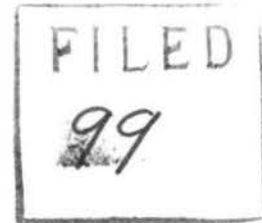
RAILROADS:
POLICE:
HIGHWAY PATROL:
LICENSES:

Railroad police licensed by the Superintendent of the State Highway Patrol under the provisions of Section 388.600, RSMo Supp. 1971, are exempt from regulation of the St. Louis Board of Police Commissioners under the provisions of Section 84.340, RSMo 1969.

OPINION NO. 99

April 24, 1972

Mr. Richard M. Miller, Secretary
St. Louis Board of Police Commissioners
1200 Clark Avenue
St. Louis, Missouri 63103



Dear Mr. Miller:

This opinion is in answer to your question in which you ask:

"1) Do the provisions of Sections 388.600 - 388.660 R.S. Mo. preempt the licensing authority of the Board of Police Commissioners as contained in Section 84.340 R.S. Mo?

"2) Regardless of whether or not the Board retains its licensing authority, may the Board of Police Commissioners continue to 'regulate' (Section 84.340 R.S. Mo.) Railroad policemen in the City of Saint Louis in any manner e.g. require minimum training, regulate carrying of firearms, specify type of uniform?"

You further add that:

"Under the provisions of Section 84.340 R.S. Mo. the Board of Police Commissioners has been licensing and otherwise regulating railroad policemen within the City of Saint Louis. Acting under this statutory authority, the Board has set licensing standards, required minimum training, and established numerous other regulatory standards. As the proposed questions indicate, we are now uncertain of our authority to continue to operate in this area."

Mr. Richard M. Miller

You are correct of course that the Board of Police Commissioners has licensed such railroad police under the provisions of Section 84.340, RSMo 1969. Manson v. Wabash Railroad Company, 338 S.W.2d 54 (Mo. 1960); Frank v. Wabash Railroad Company, 295 S.W.2d 16 (Mo. 1956).

Sections 388.600 to 388.660, RSMo Supp. 1971 provide for the licensing of railroad police by the Superintendent of the Missouri State Highway Patrol and contain provisions for the appointment, commission, identification, training and bonding of such police. Notably, Section 388.625 provides:

"Railroad policemen, while engaged in the pursuit of their purposes in regard to violations of the law which occurred on railroad property, shall have in every county and city in this state all law enforcement powers which county and city peace officers have except for the serving and execution of civil process, provided, however, that a railroad policeman shall not apply for or serve search warrants."
(Emphasis added)

It must be borne in mind that the new provisions authorizing the regulation of railroad police by the Superintendent of the State Highway Patrol are strictly regulatory in nature and have none of the attributes of a revenue act. Further, we note that railroad police of necessity must have a degree of mobility that transcends city and county lines. In our view, the legislature enacted Sections 388.600 et seq., as a special law, dealing with a special subject with statewide application.

A special or specific statute creates an exception to a prior general statute, from which it differs, to the extent of the conflict. Mennemeyer v. Hart, 221 S.W.2d 960 (Mo. 1947). In this instance the police power exercised by the Superintendent of the Highway Patrol is a matter of statewide concern and therefore, in our view, railroad police licensed under Sections 388.600 et seq., are exempt from licensing and regulation by the Board of Police Commissioners under Section 84.340. Cf. Agnew v. City of Culver City, 304 P.2d 788, 793 (Dist.App.Cal. 1956); 53 C.J.S., Licenses, § 11, p. 490 et seq. Regulation by the Board would in fact impair the police power authorized by license by the Superintendent. Cf. State v. Keirnan, 207 S.W.2d 49 (Mo.App. 1947).

CONCLUSION

It is the opinion of this office that railroad police licensed by the Superintendent of the State Highway Patrol under the provisions of Section 388.600, RSMo Supp. 1971, are exempt from regulation by the St. Louis Board of Police Commissioners under the provisions of Section 84.340, RSMo 1969.

Mr. Richard M. Miller

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH
Attorney General

September 27, 1972

OPINION LETTER NO. 100
Answer by letter-Wieler

Honorable Robert H. Martin
State Representative
306 O'Brien
Lee's Summit, Missouri 64063

FILED

100

Dear Representative Martin:

This is in response to your request for an opinion as to the authority of the director of revenue to suspend the driver's license of a resident of this state upon receipt of a notice of revocation or suspension of his driving privileges in the state of Kansas as a result of an accident there without proper liability insurance coverage.

Section 303.080, sub. 3, RSMo 1969, requires the director of revenue to suspend the license of a resident upon receipt of a notice from another state that the resident's operating privileges in that state have been suspended or revoked as a result of an accident where the circumstances surrounding the accident are such that the director would be required to suspend a nonresident's operating privileges if he had been involved in a similar accident in this state. The director is authorized by Section 303.030, RSMo Supp. 1971, to suspend the operating privileges of a nonresident where it is shown that the nonresident has been involved in an accident, that he has not complied with the provisions of the Missouri Safety Responsibility Act, and that he does not come within any of the exceptions of the law.

However, as a result of the decision of the United States Supreme Court in *Bell v. Burson*, 402 U.S. 535, 29 L.Ed.2d 90, 91 S.Ct. 1586 (1971), the driving privileges of a person involved in an automobile accident without proper liability insurance cannot be suspended, absent a court judgment of liability or an admission of liability, until such time as a hearing has been held to determine whether or not there was reasonable cause to believe that the person was at fault in the accident. As pointed out by the Supreme

Honorable Robert H. Martin

Court in a later decision, *Jennings v. Mahoney*, 404 U.S. 25, 30 L.Ed.2d 146, 92 S.Ct. 180 (1971), the only purpose of this requirement is to insure that a person whose license is being subjected to suspension is accorded the protection of procedural due process. Where procedural due process is accorded, a suspension or revocation will be allowed to stand.

Since lack of procedural due process is the only impediment to suspension of a resident's driving privilege by the director of revenue following notification of revocation of his driving privileges in the state of Kansas as a result of an automobile accident, it is our opinion that the director is required to suspend his license under the provisions of Section 303.080, sub. 3, RSMo 1969. Section 8-723 of the Annotated Statutes of Kansas allows a person aggrieved by an order of the Kansas Division of Vehicles of the Department of Revenue to seek a hearing before that division for the purpose of testing the order prior to the time it becomes effective. At the time the Missouri driver was notified by Kansas authorities that his privilege to drive in Kansas was being revoked as a result of an accident in Kansas, he was given an opportunity to contest this order before the Division of Vehicles to determine whether or not there was reasonable cause to believe that he was responsible for the damages involved.

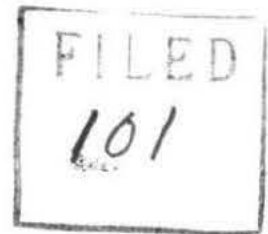
Very truly yours,

JOHN C. DANFORTH
Attorney General

April 18, 1972

OPINION LETTER NO. 101
Answer by letter-Mansur

Honorable Robert H. Branom
Representative, District 35
Room 407, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Branom:

This is in response to your request for an opinion from this office as follows:

"Section 210.211 exempts from day care licensing centers run by 'well known religious order' (emphasis mine.) Does the use of the word 'order' mean faith, denomination or church or does it mean, as commonly used, a specific group within a particular religion. If the latter, is that construction constitutional.

"The state has, in the past, licensed all day care centers except those run by a number of Roman Catholic 'orders'. Now the department has decided it can not license any center run by a religious faith. 210.211."

Section 210.211, RSMo 1969, to which you refer, makes it unlawful for any person to establish, maintain or operate a boarding home for children, a day care home or a day nursery for children, or a child placing agency as defined by Sections 210.201 to 210.245, RSMo, without having a written license granted by the State Division of Welfare. It further provides that nothing in the above statutes shall apply to "any well-known religious order."

The answer to your question depends upon the interpretation or meaning of the term "any well-known religious order" as that term is used in the above statute.

Honorable Robert H. Branom

We have been unable to find any appellate court decision in this state defining this term. The basic rule of statutory construction is first to seek the intention of the lawmaker and, if possible, to effectuate that intention. *Marty v. State Tax Commission of Missouri*, 336 S.W.2d 696 (Mo. 1960).

It is our opinion that the legislature when it enacted the above statute intended the term "any well-known religious order" to be interpreted broadly to include any and all religious denominations that have a well-defined organization, incorporated or unincorporated, that are a well-defined entity without respect to any particular creed, except that its members profess a faith in the existence of a Divine Ruler. We do not believe that it was intended to apply only to one faith such as the Roman Catholic faith.

Yours very truly,

JOHN C. DANFORTH
Attorney General

March 10, 1972

OPINION LETTER NO. 102
Answer by Letter - Klaffenbach

Honorable Lloyd J. Baker
State Representative, District 97
Room 409 Capitol Building
Jefferson City, Missouri 65101



Dear Representative Baker:

This letter is in response to your opinion request in which you ask:

"Under Section 160.011, subsection (16) RS. MO., 1969, can patrons of a common school district who voted March 4, 1972, to annex to a six director district vote in the six director district school election the first Tuesday in April if the six director district accepts the common school district in March instead of July 1."

You also state that:

"Sugar Creek district #37 of Randolph County in an election called according to Section 162.441, RSMO., 1969, to comply with Section 162.096, RSMO., 1969, voted March 4 to annex to the Moberly School District by a vote of 44 to 27. There is no need to hold a special meeting at Sugar Creek School in April so the people of the district will not get to vote in any school election."

Section 160.011 (16), RSMo 1969 to which you refer in your question states:

Honorable Lloyd J. Baker

"'Voter' means any individual who is eligible to vote in the county for state and county officers and who has resided in the school district sixty days next preceding the annual or special meeting or election at which he offers to vote."

Section 162.096, RSMo 1969 to which you refer in your statement of facts deals only with the assignment of school districts to other districts by the state board of education and is not applicable when, as we understand here, the district votes to annex to another district under Section 162.441, RSMo 1969.

We believe that your question is answered by our enclosed Opinions No. 96, dated March 22, 1956 to Wheeler and No. 89, dated February 19, 1965 to Foley.

Since annexation takes effect upon acceptance, if we assume that the annexation is accepted by the majority of the board of directors of the six director school district to which annexation is proposed under subsection 3 of Section 162.441 prior to the time set for the six director school district election, it is our view that the voters of the common school district which has been annexed are entitled to vote in such election.

The general provisions of Section 160.011 (16) respecting the qualification of voters, in our view, requires only that persons must meet such qualifications for either of the districts involved at the time such persons offer to vote.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 89
2/19/65, Foley

Op. No. 96
3/22/56, Wheeler

May 19, 1972

OPINION LETTER NO. 103
Answer by Letter - Paden

Honorable Phil Snowden,
Representative District 86
6218 N. Bales
Kansas City, Missouri 64119



Dear Representative Snowden:

This is in response to your request for an opinion on the question of whether a City or School Election held on April 4, 1972 qualifies as a general election within the meaning of Section 311.110 RSMo 1969. Specifically you have asked:

- " 1. Does a city or school election held April 4, 1972 qualify as a general election within the meaning of RSMo 311.110?
2. If the answer to 1 above is yes then what dates would be available between April 4, 1972 and August 8, 1972 whereby a special election for liquor by the drink could be held in the City of North Kansas City, Missouri?"

Please find enclosed opinion of the Attorney General Roy McKittrick to Hon. R. B. Snow, Jr., March 9, 1934 holding that a city or school election is not a general election under the Constitution of the Laws of Missouri and that an election to determine whether or not intoxicating liquor should be sold in the city must be a special election and must not take place within sixty days of any general election.

See also enclosed Opinion of Attorney General Roy McKittrick to Hon. Robert W. Hawkins of January 31, 1934 also holding that a city election is not a general election within the meaning of the constitution.

This office reaffirms the holdings of these opinions and believe them to adequately answer the question you present.

Very truly yours,

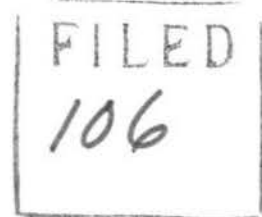
JOHN C. DANFORTH,
Attorney General

Enclosures: Op. No. 38,
1-31-34, Hawkins

Op. No. 87,
3-9-34, Snow.

November 9, 1972

OPINION LETTER NO. 106
Answer by Letter - Klaffenbach



Honorable Noel Cox
Missouri Senate, 29th District
Ozark, Missouri 65721

Dear Senator Cox:

This letter is to acknowledge receipt of your request for an opinion from this office in regard to whether or not anyone who has resided in the state of Missouri for less than a year can serve as a marshal of a town or a fourth class city. The marshal of a town or of a fourth class city is an officer of such town or city. Sections 80.250, 80.400, 80.410, 79.050, 79.330.

Article VII, Section 8 of the Missouri Constitution provides as follows:

"No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge."

This constitutional provision is applicable to city officers. Kirby v. Nolte, 164 S.W.2d 1.

It is our view that a city marshal of a town or a fourth class city comes within the provisions of Article VII, Section 8

Honorable Noel Cox

of the Missouri Constitution. Therefore, it is our opinion that an individual who has resided in the state of Missouri for less than a year cannot serve as marshal of a town or fourth class city.

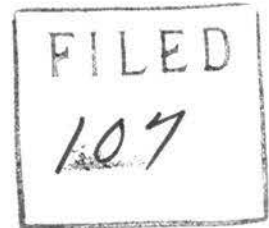
Very truly yours,

JOHN C. DANFORTH
Attorney General

April 20, 1972

OPINION LETTER NO. 107
Answer by letter-Wood

Honorable Floyd E. Lawson
Prosecuting Attorney
Monroe County
109 East Monroe
Paris, Missouri 65275



Dear Mr. Lawson:

You have requested my opinion on the following questions relating to distribution of funds received by the state for the benefit of the counties from the federal government pursuant to the Flood Control Act (33 U.S.C.A. §701c-3):

"Is the allocation of flood control lease funds solely within the discretion of the County Court, or must the Court make an allocation of funds only to those districts within the County which have lost land to the flood control project?

"Must the money be applied to completely re-imburse the school district and roads the exact amount of lost tax revenues before any funds are diverted for other county purposes?

"What percentage of the lease funds must go to the school districts, and what percentage may be diverted by the Court for other County purposes?"

We are enclosing copies of four prior opinions of this office which we think substantially answer your questions.

Opinion No. 93 of March 1, 1956, to J. S. Wallace construed Sections 12.080 and 12.100, RSMo 1969, to require the county courts

Honorable Floyd E. Lawson

to distribute Federal Flood Control Act funds by first allocating to the schools and for roads an amount computed as provided in the second sentence of Section 12.100, RSMo, and to use any remaining balance for other county purposes.

Opinion No. 179 of August 16, 1965, to Kenneth R. Babbitt, similarly concluded that these statutes required the county courts to evaluate all property acquired by the federal government under the Flood Control Act as if it were still privately owned, to compute the revenue the property would have produced for school and road purposes had there been no federal acquisition, and to allocate to the school districts and for roads the amount based upon their respective levies equal to that which would be ordinarily allowed to the school districts and for roads out of taxes on the property.

Opinion No. 77 of February 4, 1969, to Urban C. Bergbauer recognized the different treatment to be accorded Federal Flood Control Act funds (Section 12.080, RSMo) and National Forest Reserve Act funds (Section 12.070, RSMo 1969) by the county courts. Flood Control funds must be allowed to the school districts and for roads in an amount equal to that ordinarily allowed them from taxes on the United States owned property before any of such funds are used for other county expenses. National Forest Reserve funds must be used by the county courts entirely for the benefit of schools and roads in school districts wholly or partly within or adjacent to a national forest with the manner of apportionment otherwise within the discretion of the county court.

Opinion No. 182 of May 5, 1971, to Edna Eads was essentially concerned with the distribution of National Forest Reserve funds; but the opinion also concludes that a major purpose of the Flood Control legislation was to restore a measure of funds to those taxing units whose property was removed from the tax rolls by the federal government's acquisition of the property.

Therefore, in specific response to your questions, we are of the opinion that the Monroe County Court must allocate Flood Control Act funds to the school districts and roads wherein the federal property is situated in an amount which will equal the amount that would otherwise be available to the school districts and for roads through taxation of the property. Any remaining balance may be used by the county court for other county purposes. If the Federal Flood Control funds available to the county are insufficient in any year to equal all lost tax revenues attributable to the

Honorable Floyd E. Lawson

federal acquisition of the property, the county court should make an equitable apportionment of such funds among the affected school districts and for roads.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 93
3-1-56, Wallace

Op. No. 179
8-16-65, Babbitt

Op. No. 77
2-4-69, Bergbauer

Op. No. 182
5-5-71, Eads

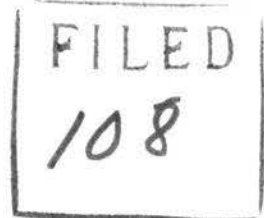
RECORDER OF DEEDS:

A quit claim deed of release in full or partial satisfaction of a deed of trust is not subject to the user fee charge of one dollar by the recorder of deeds under Section 59.319, RSMo 1969.

OPINION NO. 108

March 22, 1972

Honorable Daniel M. Buescher
Prosecuting Attorney
Franklin County
P. O. Box 229
Union, Missouri 63084



Dear Mr. Buescher:

This opinion is in response to your request in which you ask:

"Is a Quit Claim deed of release including the complete legal description of the property which is being completely or partially released an instrument conveying interest in real property such as to subject it to the 'user fee of \$1.00 under Section 59.319 of RSMo. 69.'"

You further state that:

"Franklin County's Recorder uses a Quit Claim deed, with complete legal description, and the phrase 'This Deed is made in _____ release of, and _____ satisfaction for a certain Deed of Trust, dated _____, recorded in Book _____ page _____ of the _____ County, Missouri records.' As this instrument appears to be both a Quit Claim deed on which the user tax would seem to apply and a deed of release which the user tax would not apply, the Recorder is unable to ascertain whether or not he should, in fact, charge such fee."

Section 59.319, RSMo 1969 states:

Honorable Daniel M. Buescher

"A user fee of one dollar shall be charged and collected by every recorder in this state, over and above any other fees required by law, as a condition precedent to the recording of any instrument conveying real property or any interest therein. The fee shall be forwarded monthly by each recorder of deeds to the state collector of revenue, and the fees so forwarded shall be deposited by the collector in the state treasury."

It is our understanding that it is a common practice in Missouri to use a quit claim deed with phraseology similar to that which you have quoted to release a deed of trust under Section 443.060, RSMo 1969 et seq. See Missouri Practice, Vol. 6, §707, p.p. 536-537.

Thus we believe that your question is answered by our enclosed Opinions No. 226, dated July 1, 1970 to Jackson and No. 415, dated September 28, 1970 to Holman. In the latter opinion we concluded at l.c. 4 that:

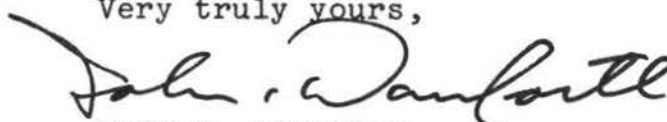
"Since a deed of trust does not convey an interest in real estate, it follows that an instrument which serves to release that lien interest is treated in the same manner. Therefore, any deed of release (whether full or partial) which releases a trustee or mortgagee's lien interest does not convey an interest in real property and does not come within the scope of Section 59.319."

CONCLUSION

It is the opinion of this office that a quit claim deed of release in full or partial satisfaction of a deed of trust is not subject to the user fee charge of one dollar by the recorder of deeds under Section 59.319, RSMo 1969.

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 226, 7/1/70, Jackson
Op. No. 415, 9/28/70, Holman

June 7, 1972

OPINION LETTER NO. 109
Answer by letter-Jones



Mr. Henry Maddox, Director
Division of Commerce &
Industrial Development
P. O. Box 118
Jefferson City, Missouri 65101

Dear Mr. Maddox:

This letter is to acknowledge receipt of your request for an opinion from this office in regard to the authority of a sponsor of an airport to comply fully with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

In connection with the above, it is our understanding that certain constitutional charter cities have made requests for financial assistance from the Federal Aviation Administration of the Department of Transportation for their respective airport projects.

Public Law 91-646 which may be cited as the "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970" and hereinafter referred to as the Act, was legislation passed by Congress to provide for uniform and equitable treatment of persons displaced from their homes, businesses, or farms by federal and federally assisted programs and to establish uniform and equitable land acquisition policies for federal and federally assisted programs. See U. S. Code Congressional and Administrative News, Volume 2, page 2222.

Title II of the Act refers to uniform relocation assistance. In general, the following categories of assistance are provided for: (1) moving expenses from homes, businesses and farm operations (Section 202); (2) replacement housing for tenants (Section

Mr. Henry Maddox

204). This assistance is required to be provided by any state agency receiving federal funds for any project resulting in displacement of any person after July 1, 1972 (Section 210).

Title III of the Act refers to uniform real property acquisition policy. In this regard, Section 305 of the Act provides that state agencies administering programs receiving federal financial assistance must be guided to the greatest extent practicable under state law, by the land acquisition policies set forth in Sections 301 and 302 of the Act, as a condition of such federal assistance. In addition, Section 305 of the Act provides that state agencies administering programs receiving federal financial assistance must provide for reimbursement of the owner for expenses incidental to transfer of title and for reasonable expenses of litigation.

It should be noted that Article VI, Section 19(a) of the Missouri Constitution provides as follows:

"Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the Constitution of this State and are not limited or denied either by the charter or [sic] adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law."

Therefore, it is our view that the above constitutional provision is a grant of power and adequate to authorize constitutional charter cities to use their funds in combination with federal financial assistance, for such relocation assistance purposes if such use is provided for by a charter provision or by proper enactment by the municipal legislative body. In this regard, we are not aware of any constitutional or statutory provisions, and have not been advised that there are any charter provisions, which will prohibit the constitutional charter cities from giving any such assurances.

It is, therefore, our opinion that constitutional charter cities have the authority to give assurances to the Federal Aviation Administration of the Department of Transportation as are required by the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 if such assurances are authorized by the charter of such cities or by proper enactment by the municipal legislative bodies.

Yours very truly,

JOHN C. DANFORTH
Attorney General

PENSIONS:
TAXATION (INTANGIBLE):
FIRE PROTECTION DISTRICTS:

A fire protection district located in a county of the first class may use the intangible personal property taxes it receives for pensioning of its firemen provided a majority of the qualified voters casting votes vote in favor of pensioning the salaried members of the fire department as provided under Section 321.600, RSMo 1969.

OPINION NO. 111

May 18, 1972

Honorable James Russell
Representative, District 25
700 Bellarmine Lane
Florissant, Missouri 63031



Dear Representative Russell:

This is in response to your request for an opinion from this office as follows:

"Under Missouri Statute Laws, Sections 321.220, 321.240, 321.600 and 321.610 the Florissant Valley Fire Protection District on April 8, 1969, put before the qualified voters of Said District for the pensioning of salaried members; having passed and been approved, the Florissant Valley Fire Protection has been putting a portion of Intangible taxes they receive in the pension fund.

"Under Chapter 321.(FIRE PROTECTION DISTRICT), Chapter 87(FIREMEN'S RETIREMENT AND RELIEF SYSTEMS) or any Missouri Statute Laws, is the Florissant Valley Fire Protection District allowed to use Intangible Taxes for the pension fund?"

Florissant Valley Fire Protection District is located in St. Louis County which is a first class county.

Section 321.600, RSMo 1969, which applies to first class counties, provides in part that the board of directors of a fire protection district located in a first class county may provide for the pensioning of the salaried members of its organized fire department and to provide for the payment of death benefits to the widows and minor children of its organized fire department or if such member is unmarried and without minor children, to his next of kin; and to provide for the payment of health, accident

Honorable James Russell

and disability benefits to such salaried members of its organized fire department who shall become disabled due to injury or disease incurred while in the performance of their duties, except that no board shall have the authority herein set forth until approved by the qualified voters of the district. It further provides that if a majority of the qualified voters casting votes thereon at the election be in favor the board shall then and thereafter effect such a program for the pension and benefit payments authorized at the election as shall be necessary for the operation of the district. (Emphasis supplied)

You state that on April 8, 1969, the qualified voters of the Florissant Valley Fire Protection District voted under provisions of Section 321.600, RSMo, in favor of pensioning the salaried members of the fire department, and you inquire whether moneys received by the fire protection district from the intangible taxes collected by the district can be used for the pension fund.

Section 321.610, RSMo 1969, which applies to fire protection districts in first class counties, provides in part as follows:

"To levy and collect taxes as herein provided, the board shall in each year determine the amount of money necessary to be raised by taxation, and shall fix a rate of levy which, when levied upon every dollar of the taxable tangible property within the district as shown by the last completed assessment, and with other revenues, will raise the amount required by the district annually to supply funds for paying the expenses of organization and operation and the costs of acquiring, supplying and maintaining the property, works and equipment of the district, and maintain the necessary personnel, which rate of levy shall not exceed thirty cents on the one hundred dollars valuation; may fix an additional rate, not to exceed five cents on the hundred dollars valuation, the revenues from which shall be deposited in a special fund and used only for the pension program of the district, by submitting the following question to the voters at any election in such district at which a member of the board of directors is to be elected or at any regular municipal or school election conducted by the board of election commissioners in such district:

OFFICIAL BALLOT

Instruction to voters:

Honorable James Russell

Place an (X) in one square.
Shall the Board of Directors of _____
Fire Protection District be authorized to levy
an annual tax rate of _____ cents per one
hundred dollars valuation, the revenues from
which shall be deposited in a special fund and
used only for the pension program of the dis-
trict?

YES

NO

provided, that if the question fails to receive
a majority of the votes cast, it shall not be
resubmitted to the voters within one year after
the election; . . ." (Emphasis supplied)

The first question is whether the general revenue may be used
for the pension fund or whether only the moneys received from a
special tax authorized under provisions of Section 321.610, RSMo,
by a vote of the people and deposited in a special fund and used
only for the pension program can be used for this purpose. It is
our opinion that general revenue may be used for the pensioning of
the firemen.

In *Decker v. Dimer*, 229 Mo. 296, 129 S.W. 936 (Mo. banc 1910),
the question involved the right of the county court to transfer
surplus funds of a county to a courthouse fund for the purpose of
constructing the courthouse. The statutes provided for the county
court of any county to build a courthouse if there shall be suffi-
cient funds in the county treasury for that purpose not otherwise
appropriated. The statutes also provided for a county to issue
bonds to obtain money to be used for building a courthouse. In
discussing this question, the court stated, l.c. 948, as follows:

" . . . We are further of the opinion that,
when all warrants and debts properly charge-
able to a fund in any one year are paid and
provided for, the residue of such fund is a
'surplus' within the purview of the transfer
sections. Is not the building of a courthouse
as legitimate as any other county purpose?
Are bonds so desirable that the people of a
Missouri county must bond themselves when
bonds are not necessary, or go without a
courthouse? Must they levy special taxes
when they have the means in the treasury to

Honorable James Russell

avoid such special levy? Running like a thread through the statutes is the idea of as low a rate of taxation as is compatible with the welfare of people, and the other idea that the county's business must be done for cash. All these ideas are conserved by the holding made." (Emphasis supplied)

Although the above case involved different statutes from those now being considered, we believe the same principles of law are involved and should be applied.

It is our opinion when the majority of qualified voters casting votes in an election held pursuant to Section 321.600, RSMo, the board of the fire protection district shall immediately thereafter provide a program for the pension and benefit payments authorized by the election as are necessary for the operation of such program. This is required of the board even though the additional five cent tax may or may not have been voted upon under Section 321.610, RSMo. It is our opinion, therefore, that the general revenue of the fire protection district may be used to pension the salaried firemen.

In answer to your question whether the funds received by the fire protection district from the intangible tax may be used for this purpose, it is our opinion that they may.

Article X, Section 4(c), Constitution of Missouri, 1945, provides:

"All taxes on property in class 3 [intangible personal property] and its subclasses, and the tax under any other form of taxation substituted by the general assembly for the tax on bank shares, shall be assessed, levied and collected by the state and returned as provided by law, less two per cent for collection, to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy."

Chapter 146, RSMo 1969, provides for a tax on intangible personal property the taxes collected to be distributed to each political subdivision according to the local rates of levy. The statutes are silent regarding the use of the tax.

The Supreme Court of Missouri, en banc, has interpreted the foregoing section in *State ex rel. Board of Directors of St. Louis Public Library v. Dwyer*, 234 S.W.2d 604 (Mo. banc 1950). That case

Honorable James Russell

involved an original proceeding in mandamus before the Supreme Court of Missouri, en banc, against the treasurer of the City of St. Louis, to require said treasurer to set apart for the Library Fund of the city free public library, a percentage of the amounts received from the State Director of Revenue for taxes collected pursuant to now Section 146.110, RSMo 1969. The court, in discussing the purposes to which the money collected as intangible taxes is to be put, stated as follows, l.c. 607:

" . . . However, the people voted this part of the City levy for the Library Fund; and, since the City had the right to have it considered in fixing its proportion of the taxes collected by the State at 175/266 in 1946, we see no reason why it should not have the right, and duty, to use the 4/266 (4/175 of its part), thus added and received, for the purpose for which the people voted it. . . ." (Emphasis supplied)

Additionally, on motion for rehearing in discussing the purposes to which the City of St. Louis was to put the amounts returned to it from the State Director of Revenue, the court stated, l.c. 607:

" . . . The Constitution, Sec. 4(c), art. X, Mo.R.S.A., requires the return of the intangible tax 'to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy.' The other 1945 Acts, cited in our opinion, provide how this shall be done. Harmonizing all of these provisions, we think it is clear that the rate of taxation on the assessed valuation of property, subject to ad valorem taxation, is intended to provide the basis for determining the amount and use of intangible tax revenue returned to each political subdivision; and we so rule." (Emphasis the Court's)

From the foregoing, it is the conclusion of this office that as to the amounts returned by the State Director of Revenue, collected as intangible taxes, these amounts are to be set apart and credited to the specific levy, in pro rata amounts, which provides the political subdivision's taxable basis.

It is our opinion that the intangible tax funds received by the Florissant Valley Fire Protection District becomes revenue of the fire protection district to be distributed pro rata to the

Honorable James Russell

funds for which the tax was levied, including the general revenue funds, and general revenue funds may be used to pension the firemen. We do not believe it was the intent of the legislature that the firemen's pension fund consist only of the revenues received as an additional tax rate under Section 321.610, RSMo. It is possible for the voters to vote in favor of pensioning the firemen under Section 321.600, RSMo, and it is not necessary to authorize a special tax under Section 321.610, RSMo. It is our view it is the intent of the legislature for the general revenue of the fire protection district to be used for the pensioning of the firemen as provided in Section 321.600, RSMo, and at the same time authorize an additional tax levy under Section 321.610, RSMo, to be levied after a vote of the people to be used only for the purpose of pensioning the firemen if the fire protection district does not have sufficient funds for this purpose without a special tax levy.

CONCLUSION

It is the opinion of this office that a fire protection district located in a county of the first class may use the intangible personal property taxes it receives for pensioning of its firemen provided a majority of the qualified voters casting votes vote in favor of pensioning the salaried members of the fire department as provided under Section 321.600, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

March 22, 1972

OPINION LETTER NO. 112
Answer by Letter - Klaffenbach

Honorable J. H. Frappier
State Representative, District 24
Room 202J Capitol Building
Jefferson City, Missouri 65101



Dear Representative Frappier:

This letter is in response to your question in which you ask:

"Does the St. Louis County Board of Election Commissioners have the authority to register qualified county residents outside of the geographical boundaries of St. Louis County?"

You further state that:

"Various organizations have attempted to sponsor registration efforts at various institutions, shopping centers, factories, etc. It would encourage & facilitate registration if the vehicle contained clerks from both the city and county boards and thereby be able to register residents of either area. As the attached letter indicates, a strict interpretation of chapter 113.180 RSMo subsection 3, prevents the efficient registration of voters."

Although you mention Section 113.180, we believe you refer to Section 113.210, RSMo Supp. 1971.

Subsection 3 of Section 113.210, RSMo Supp. 1971, which is applicable to St. Louis County provides:

Honorable J. H. Frappier

"The board of election commissioners shall, for the purpose of registering new voters, or reinstating the classes of persons whose registration was suspended or canceled, cause its office to be open on at least three separate days of each week to register or reinstate them on the registration list of the precinct in which they then reside, but no new registration of voters or reinstatement of persons suspended or canceled on the registration records shall be made at any time later than 5:00 p.m. on the twenty-eighth day preceding any general, special or primary election except that, when a special election is held at a time so as to interfere with normal registration under this section, no person shall be denied the right to register at a time not later than the twenty-eighth day preceding any general or primary election. No registration of new voters shall be permitted sooner than fifteen days after an election in counties included in sections 113.010 to 113.420. The board of election commissioners may establish additional places of registration in the county and supervise the registration of voters at the additional places of registry. Registration shall be held at each additional place of registry at the time and hours to be determined by the board of election commissioners. The additional places of registry may be established in public, private or mobile units and subject to change by the board from time to time as, in its discretion, the circumstances require. The clerk and assistants regularly employed in the office of the clerk of any city, town, or village and regular employees of fire protection districts, school districts, and public libraries may be appointed by the board of election commissioners as deputy registration officers. All persons so appointed may accept registration of voters at their offices at the time and hours to be determined by the board." (Emphasis added)

We have reviewed the opinion of the legal counsel for the Board and agree with such opinion that the provisions of the section, which we have underscored for emphasis, indicate a clear legislative intent that the registration be conducted as prescribed therein thus excluding registration at such places you mention outside the boundaries

Honorable J. H. Frappier

of St. Louis County. In this respect we call your attention to our enclosed Opinion No. 206, dated May 29, 1967, to Almond.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 206
5-29-67, Almond

July 3, 1972

OPINION LETTER NO. 114
Answer by Letter - Paden

Honorable R. J. Gordon
Prosecuting Attorney
Hickory County
P. O. Box 4
Hermitage, Missouri 65668



Dear Mr. Gordon:

This opinion is in response to your request for an opinion from the Office of the Attorney General with respect to the following inquiry:

"May the Sheriff of a fourth class county appoint deputies, who are non-residents of the county, in an emergency situation? In the event that he may not make such appointment, is a law enforcement officer from any other jurisdiction considered a peace officer or a private citizen when he aids a county sheriff in enforcing the law at the request of such sheriff?"

The authority for the sheriff to appoint deputies in an emergency situation is derived from Section 57.119, RSMo 1969, as follows:

"In any emergency the sheriff shall appoint sworn deputies, who are residents of the county, possessing all the qualifications of sheriff. The deputies shall serve not exceeding thirty days, and shall possess all the powers and perform all the duties of deputy sheriffs, with like responsibilities, and for their services shall receive two dollars per day, to be paid out of the county treasury."

Honorable R. J. Gordon

Section 57.119, RSMo 1969, limits the authority of a sheriff to appoint sworn deputies in emergency situations to those deputies who are residents of the county and possess all the qualifications of sheriff. See State v. Owen, 258 S.W.2d 662 (Mo. 1953), see Opinion of the Attorney General No. 15, Caslavka, 9-8-54.

It is therefore the opinion of this office that a sheriff of a fourth class county may not appoint deputies in an emergency situation who are not residents of that county.

In the second part of your question you ask, if a law enforcement officer from another jurisdiction is considered a peace officer or a private citizen when he aids a county sheriff in enforcing the law at the request of such sheriff. In State v. Goodman, 449 S.W.2d 656 (Mo. 1970), the Supreme Court indicated that a person summoned by the sheriff to assist him in making an arrest for a felony is neither an officer nor a private citizen, but occupies the legal position of a posse comitatus.

"In a proper case the sheriff may summon to his assistance any person to assist him in making an arrest for a felony. A posse comitatus, i.e., those called to attend the sheriff, may be summoned verbally. The mode is immaterial, so long as the object is to require assistance. A person so summoned is neither an officer nor a mere private person, but occupies the legal position of a posse comitatus and while cooperating with the sheriff and acting under his orders is just as much clothed with the protection of the law as the sheriff himself. It is not essential for a posse comitatus to be and remain in the actual physical presence of the sheriff; it is sufficient if the two are actually endeavoring to make the arrest and acting in concert with a view to effect their common design." (l.c. 661) (Emphasis added).

The right of the sheriff to summon a posse comitatus, or the whole power of the county, exists by virtue of the common law and statutes empowering a sheriff to summon aid in the suppression of disturbances of the peace. 80 C.J.S. Sheriffs and Constables, §34, pp. 202-203; Sections 542.150, 542.170; 542.180; 542.190, RSMo 1969.

Honorable R. J. Gordon

The authority of a sheriff to summon a posse comitatus under the common law exists by virtue of Section 105.210, RSMo 1969, as follows:

"In all cases where, by the common law or a statute of this state, any officer is authorized to execute any process, he may call to his aid all male inhabitants above the age of twenty-one years in the county in which the officer is authorized to act."

Therefore, the sheriff may summon under his common law authority a posse comitatus only those male inhabitants above the age of twenty-one years in the county in which the sheriff is authorized to act.

It is the opinion of this office that a law enforcement officer from another jurisdiction could not validly be summoned by the sheriff as a posse comitatus for the reason that this law enforcement officer would not be an inhabitant of the county in which the sheriff is authorized to act and would not be clothed with the protection of the law afforded to the sheriff, his deputies and his posse comitatus. State v. Owen, supra.

It is the opinion of this office that a sheriff of a fourth class county may only appoint deputies in an emergency situation who are residents of such county. A law officer from another jurisdiction who is not a resident of such county is not eligible to be appointed a special deputy or eligible to be summoned a posse comitatus and therefore is not clothed with the protection of law afforded the sheriff himself.

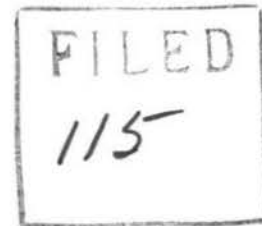
Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 15,
9-8-54, Caslavka

March 27, 1972

OPINION LETTER NO. 115
Answer by letter-Klaffenbach



Honorable Thomas D. Graham
Representative, District 122
Room 317, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Graham:

This letter is in response to your opinion request in which you state:

"The County Court of Cole County has been petitioned under the provisions of Section 233.160, RSMo, to dissolve the Jefferson City Special Road District No. 1 of Cole County. The County Court wishes to enter into a contract to provide mutual services with the City of Jefferson should the District be dissolved, said contract to provide that not less than 25% of the County Bridge and Road Tax monies collected from within the City of Jefferson will be paid over to the City of Jefferson for street and bridge purposes. It is anticipated a contract will be entered into between the County Court and the City whereby, in consideration of the said 25%, the City will agree to provide certain mutually agreeable services to the County (See Section 137.555, RSMo, and Chapter 70, RSMo, i.e., 70.210 and 70.220).

"An objection has been raised that the County Court is without legal authority to enter into a contract with the City of Jefferson obligating bridge and road funds. May the County Court do so?"

Honorable Thomas D. Graham

You also ask:

". . . if you find that the County Court cannot use county road and bridge tax monies, in your opinion, would it be possible, under Chapter 70, RSMo, to enter into contracts with the City to provide mutual services between the county and city relating to road building and engineering, using funds other than road and bridge tax monies, as set forth in said chapter."

In our view both of your questions are answered by the enclosed opinions which are self-explanatory. It is clear that road and bridge funds of Cole County must be used as prescribed by Section 137.555, RSMo 1969, which provides:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any

Honorable Thomas D. Graham

incorporated city or village in the county,
if said street shall form a part of a contin-
uous highway of said county leading through
such city or village." (Emphasis added)

The underscored provisions emphasize the express restrictions placed upon the use of such road and bridge funds in implementation of Section 12(a) of Article X of the Missouri Constitution.

It is therefore our view that Cole County has no authority to turn road and bridge funds over to the City of Jefferson for the city's use. Such funds can only be used by the county court in improving or repairing streets in cities in the county which form a part of a continuous highway of the county leading through the city as provided in Section 137.555.

We further note that it is well settled that unauthorized payments of public moneys by an official, particularly when made in direct violation of positive law, may be recovered. Kansas City v. Halvorson, 177 S.W.2d 495 (Mo. 1944); State v. Powell, 221 S.W. 2d 508 (Mo. 1949).

In answer to your second question concerning the provisions of Chapter 70, RSMo 1969, respecting cooperative agreements and the use of "funds other than road and bridge tax monies," we presume you refer to county general revenue funds. While cities and counties may contract for certain purposes under Sections 70.210, RSMo 1969 et seq., when the subject and scope of such contracts are within the scope of the powers of such municipalities and counties, we do not have the precise proposed provisions before us and therefore do not attempt to pass upon the legality of such provisions. However, the enclosed opinions which construe the cooperative agreement provisions may be utilized as a guide in determining the propriety of any action to be taken.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 169
6-7-71, Gant

Op. No. 270
5-19-71, Martin

Op. No. 260
10-6-70, Gant

Honorable Thomas D. Graham

Op. No. 296
8-21-70, Brandom

Op. No. 475
10-20-70, Rea

Op. No. 504
12-16-70, Young

Op. No. 530
12-10-70, McKenzie

Op. No. 193
6-12-69, Moore

Op. No. 308
8-22-69, Holman

Op. No. 237
11-14-68, Parker

Op. No. 230
3-29-66, Holman

Op. No. 213
5-15-63, Cantrell

Op. No. 53
9-15-50, Lewis

ELECTIONS:
CANDIDATES:
RESIDENCE:
COMMITTEEMEN:

Under the provisions of Sections 120.770 and 120.340, RSMo 1969, a candidate for the office of committeeman who is not a resident of the ward for which he files is not eligible to have his name placed on the ballot.

OPINION NO. 116

April 11, 1972

Honorable C. E. Hamilton, Jr.
Prosecuting Attorney
Callaway County, Courthouse
Fulton, Missouri 65251



Dear Mr. Hamilton:

This letter is in answer to your request for an opinion in which you ask:

"Can a person who is not a resident of an election ward as of the date of filing for election closes file for party committeeman of that ward if he will be a resident of the ward and a qualified elector in the ward as of the date of the August primary election?"

You state that:

"A person in Fulton, Missouri, has been Republican Committeeman from Ward 3 for sometime. In the month of June 1972 he plans to move to a location in Ward 2. However, as of the closing date for filing, April 25, 1972, he will still be a resident of Ward 3. If he moves to Ward 2 in June he will be a qualified elector of Ward 2, to vote in the August primary. The County Clerk desires to know if this man should be permitted to file for committeeman from Ward 2."

In addition you note that you have considered our holding in Opinion No. 160 dated March 2, 1970, to James, copy enclosed, in which we held that a person who meets the residency and age requirements to vote in the November general election, although he is not

Honorable C. E. Hamilton, Jr.

twenty-one at the time of the primary election may file for the office of committeeman pursuant to Section 120.770, RSMo 1969. We repeat these pertinent sections here for the sake of clarity.

Section 120.770 with respect to the election of committeemen states:

"At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the case may be, for committeemen for such township, or voting district, and the man and the woman receiving the highest number of votes in such township, or election district, shall be the members of the party committee of the county of which such voting precinct or district is a part. Any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman by complying with the provisions of section 120.340 and, in all counties in this state now or hereafter containing a city of the first class, by also paying the sum of five dollars to the treasurer of the county committee of the party on whose ticket he or she seeks election."
(Emphasis added)

Section 120.340 with respect to the declaration of candidacy states in part:

"No candidate's name shall be printed upon any official ballot at any primary election unless the candidate has on or before five p.m. prevailing local time on the last Tuesday of April preceding the primary filed a written declaration of candidacy, as provided in sections 120.300 to 120.650, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, and that if nominated and elected to the office he will qualify. The declaration shall be in substantially the following form: . . ." (Emphasis added)

In our view the underscored portions of the above sections emphasize that the legislature intended that such candidate be

Honorable C. E. Hamilton, Jr.

a resident of such voting precinct or district at the time that he files his declaration of candidacy. In this instance since the person involved will not be a legal resident until after the time for filing his declaration has passed he is not eligible to have his name placed on the ballot.

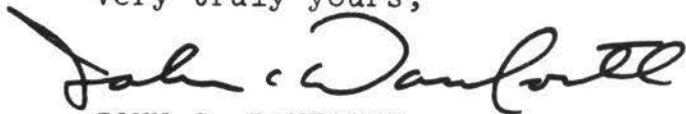
We adhere to the conclusion reached in Opinion No. 160, 1970 to James, noted above, and we are of the view that such opinion is not inconsistent with the views we express here because such prior opinion assumed that the residency requirements were met at the time of the filing of the declaration.

CONCLUSION

It is the opinion of this office that under the provisions of Sections 120.770 and 120.340, RSMo 1969, a candidate for the office of committeeman who is not a resident of the ward for which he files is not eligible to have his name placed on the ballot.

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 160
3/2/70, James

March 27, 1972

OPINION LETTER NO. 117
Answer by Letter - Burns

Honorable Harold F. Reisch
State Representative, District 119
Room 235 Capitol Building
Jefferson City, Missouri 65101



Dear Representative Reisch:

This is in answer to your recent opinion request in which you ask as to the meaning of the phrase "municipal townships" as used in Section 49.010, RSMo 1969; whether the term "municipal townships" as used in Section 49.010 means "townships" as such word is used in Section 47.010, RSMo 1969, and also asking whether counties not operating under the township organization form of government are required to comply with the requirement in Section 49.010, that county court districts be as nearly equal in population as practicable.

We are enclosing several opinions of this office which we believe answer your questions.

Opinion No. 427, rendered December 27, 1962 to Larry M. Woods, applicable to Boone County, a county not under the township organization form of government, holds that Section 49.010 is applicable to such county and that county judge districts cannot divide municipal townships in such county.

Opinion No. 114, rendered March 30, 1965 to Clifford A. Falzone, applicable to Randolph County, a county not under township organization form of government, holds that the provisions of Section 49.010 are applicable to such county and that under provisions of Section 47.010 the county court of such county has power to divide a city in the creation of townships.

Honorable Harold F. Reisch

Opinion No. 166, rendered May 24, 1965 to Gerald Kiser, applicable to Clay County, a county not under township organization form of government, holds that under provisions of Section 49.010 the county court has a right and a duty to create county judge districts as nearly equal in population as practicable.

Opinion No. 5, rendered June 19, 1952 to Charles V. Barker, applicable to Polk County, a county not under township organization form of government, holds that the county court by formal order may change the county judge districts at any of its regular terms.

We believe it to be clear from the enclosed opinions that "municipal townships" as such phrase is used in Section 49.010 does encompass the term "townships" used in Section 47.010 and that counties not under township organization form of government are required to comply with the provisions of Section 49.010 and to create county judge districts as nearly equal in population as practicable.

In connection with the definition of "municipal township" we call your attention to the case of Union Township v. Cotton Hill Township, 294 Mo. 538. The Supreme Court in that case quoted from the decree of the circuit court of Dunklin County. Such decree discloses that prior to 1872 the county was divided into municipal townships under what is now Section 47.010, RSMo 1969 but the records of the county were destroyed in 1872 and at that time the county court re-established the boundaries of the townships and that such county did not adopt township organization form of government until the year 1914. Quoting from the circuit court decree, the court said l.c. 542:

"On this 25th day of February, 1921, this cause having been heretofore submitted upon the pleadings and the proof adduced by the plaintiffs and the defendants, and the court, having duly considered the same, doth find that Union Township and Cotton Hill Township are municipal townships in Dunklin County, Missouri; that prior to the year 1872 said county had been divided into municipal townships, two of which were those named above, and that the records of the county having been destroyed by fire the county court of said county, on the 8th day of October, 1872, during the October term of said court, re-established of record the boundaries of said municipal townships, . . ."

Honorable Harold F. Reisch

You will note that the reference of the court to the division into townships under what is now Section 47.010 characterized them as "municipal townships".

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 427
12/27/62, Woods

Op. No. 114
3/30/65, Falzone

Op. No. 166
5/24/65, Kiser

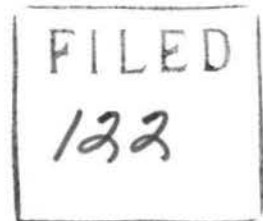
Op. No. 5
6/19/52, Barker

TAXATION (SALES & USE): The term "sale at retail" as defined
TAXATION (EXEMPTION): by Section 144.010(8), RSMo 1969,
 does have the same meaning as the term
"retail sale", used in Section 144.025. The term "retail sale"
refers only to sales made by those engaged in business and not in
transactions between individuals. When an individual trades his
automobile to another individual the net difference after a trade-
in is immaterial because the transaction is not a "retail sale"
and the full value of the automobile purchased is used to calcu-
late the tax.

OPINION NO. 122

October 11, 1972

Honorable Joe D. Holt
State Representative
808 Court Street
Fulton, Missouri 65251



Dear Representative Holt:

Your recent opinion request asked the following question:

"Do the provisions of Section 144.025, RSMo 1969, which referred to '. . . retail sale . . .' have the same definition as the provisions of Section 144.010(8), as they refer to 'sale at retail.' If the provisions of 144.025 do not have the same meaning, what is the meaning of the provisions of Section 144.025?"

Your request also states that your question refers to the situation in which an automobile is traded to an individual by another individual in purchasing an automobile. In this transaction you state there was a cash payment of \$1,500 to purchase the automobile in addition to the trade-in. You inquire whether the provisions of Section 144.025 apply to sales between individuals as well as sales between an individual and one engaged in the business of selling automobiles.

Section 144.025, RSMo, states:

"Other provisions of law notwithstanding, in any retail sale where any article on which a sales or use tax has been paid to this state is taken in trade as a credit or part payment

Honorable Joe D. Holt

on the purchase price of the article being sold and the difference between the trade-in allowance and the purchase price exceeds five hundred dollars, the tax imposed by sections 144.020 and 144.440 shall be computed only on that portion of the purchase price in excess of the actual allowance made for the article traded in or exchanged."

Section 144.010(8), RSMo, defines "sale at retail" as:

". . . any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; provided, however, that for the purposes of sections 144.010 to 144.510 and the tax imposed thereby, purchases of tangible personal property made by duly licensed physicians, dentists and veterinarians and used in the practice of their professions shall be deemed to be purchases for use or consumption and not for resale. . . ."

Section 144.440(1), RSMo, the provision imposing a use tax on motor vehicles, states as follows:

"In addition to all other taxes now or hereafter levied and imposed upon every person for the privilege of using the highways of this state, there is hereby levied and imposed a tax equivalent to three percent of the purchase price, as defined in section 144.070, which is paid or charged on new and used motor vehicles and trailers purchased or acquired for use on the highways of this state which are required to be registered under the laws of the state of Missouri."

The problem of definition of terms used in tax acts is a recurrent one. As was observed in International Business Machines Corp. v. State Tax Commission, 362 S.W.2d 635, 638 (Mo. 1962):

". . . Each state employs its own definitions, particularly of 'sales at retail,' and in general these statutes enlarge upon both the dictionary and common acceptance of the

Honorable Joe D. Holt

term and thus may tax a variety of particular dealings and transactions. . . ."

In many jurisdictions, the terms "retail sale" and "sale at retail" are used synonymously. In each case, such use is based on a statutory definition that equates the terminology or uses it interchangeably. E.g., Calvert v. Marathon Oil Company, 389 S.W.2d 153 (Tex.Civ.App. 1965); Lakeside Truck Rental, Inc. v. Bowers, 180 N.E.2d 140 (Ohio 1962); Coca-Cola Bottling Plants v. Johnson, 87 A.2d 667 (Me. 1952); Kohn v. City of Philadelphia, 30 A.2d 672 (Pa. 1943) (citing appropriate statutory definitions). In a decision of City of St. Louis v. Smith, 114 S.W.2d 1017 (Mo. 1937) at 1019, the court quoted a statutory definition from the Laws of 1935 that, at least to the court, equated the term "retail sale" with the term "sale at retail." The definition of "sale at retail" in that act is essentially that carried forward in the currently valid section 144.010(8) defining "sale at retail." A use tax is imposed on sales of motor vehicles by one individual to another individual under the provisions of Section 144.440, supra.

In practical effect, your question asks whether or not the term "retail sale", as used in Section 144.025, RSMo 1969 includes the sale of automobiles between individuals or includes only a sale by a person engaged in business. Since the enactment of Section 144.025, the Department of Revenue of the State of Missouri has administratively applied its terms only to transactions in which a person engaged in the business of selling motor vehicles or other tangible personal property is involved. Specifically, the Department of Revenue has taken a position that the term "retail sale" in Section 144.025 applies only to sales by automobile dealers and does not apply to sales by one individual to another because the sale is not made by one engaged in business. The legislative history of Section 144.025 supports this conclusion. That section was enacted by Senate Bill No. 4 in 1963. Such senate bill also contained a reenactment of Section 144.020. Section 144.020 imposes a tax "upon every retail sale in this state of tangible personal property." Clearly the phrase "retail sale" in Section 144.020 refers to a "sale at retail" as defined in Section 144.010. When we find in the same senate bill the use of the term "retail sale" in Sections 144.020 and 144.025, it appears to be the legislative intent that the term "retail sale" is to be equated to the definition of "sale at retail", found in Section 144.010. Most probably, had the legislative intent been to exempt all sales involving a trade-in in which over \$500 cash was paid, the word retail would have been deleted. Therefore, the term "retail sale" as used in Section 144.025 refers only to sales made by those engaged in business and is not applicable to transactions between individuals.

Honorable Joe D. Holt

You also inquire how Section 144.025, RSMo 1969, is to be applied in transactions involving a trade-in. That provision has been explained by the Department of Revenue in Rule No. 36 of the Rules and Regulations applicable to the Missouri Sales/Use Tax Law (1967). Rule No. 36, in the examples given by the Department of Revenue, is as follows:

"Sales of automobiles at retail are taxable at full sales price thereof and said tax will be due and payable when applying for title. An exemption may be allowed for automobile traded-in provided Missouri Sales or Use Tax has been paid on the automobile being traded in and the net difference after trade-in exceeds \$500.00.

"Example. - If a new car is being purchased and the price of the new car is \$3,000.00 and an old car is being traded in and an allowance is made for the old car of \$1,000.00 and tax has been paid in Missouri on the old car at the time of purchase then the tax would apply to the net difference or \$2,000.00.

"Example. - If a new car is being purchased at the cost of \$2,000.00 and an old car is being traded in for \$1,800.00 then the tax would apply to the full \$2,000.00 as the net difference after trade-in is less than \$500.00.

"When the used car taken in on a trade is in turn sold at retail by such dealer, such sales are also taxable. The Act imposes a tax upon the sale or transaction to be paid by the purchaser. Therefore, the question of double taxation is eliminated."

Enclosed is a copy of Opinion No. 43, 1964, which more fully discusses the workings of Section 144.025, RSMo 1969.

Thus, in the fact situation presented in your request, the net difference after the trade-in is immaterial because the transaction between two individuals is not a "retail sale". When an individual trades in his automobile to another individual the net difference after such a trade-in is immaterial because the transaction is not a retail sale and the full value of the automobile purchased is used to calculate the tax.

CONCLUSION

Honorable Joe D. Holt

It is the opinion of this office that the term "sale at retail" as defined by Section 144.010(8), RSMo 1969, does have the same meaning as the term "retail sale", used in Section 144.025. The term "retail sale" refers only to sales made by those engaged in business and not in transactions between individuals. When an individual trades his automobile to another individual the net difference after a trade-in is immaterial because the transaction is not a "retail sale" and the full value of the automobile purchased is used to calculate the tax.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Peter H. Ruger.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 43
4/3/64, Jones

ELECTIONS:
REGISTRATION:

1. The requirement of one year's residence in the state as a condition to voting established by

Article VIII, Section 2 of the Missouri Constitution and Section 111.021 RSMo 1969 is unconstitutional and void. 2. If the durational requirement of sixty days residence in a county, city or town as a condition to voting is held valid by the court in the case now pending in the United States District Court for the Western District of Missouri, such duration of residence will be required as a condition for voting at the November election but such duration of residence is not required in order to vote at the preceding primary election. 3. Any otherwise qualified person who is a resident of the City of St. Louis at the time of registration, regardless of the duration of his residence, may register to vote at the primary at any time prior to 5:00 p.m. on the 28th day preceding the primary election date as provided in Section 118.240, RSMo Supp. 1971. 4. The St. Louis City Election Board should register all residents of such city who apply before 5:00 p.m. on the 28th day preceding the August 1972 primary date if they have all other constitutional qualifications. Such persons are entitled to vote in the 1972 primary.

OPINION NO. 123

May 10, 1972

Mr. John T. Wiley, Chairman
Board of Election Commissioners
City of St. Louis
208 South 12th Boulevard
St. Louis, Missouri 63102



Dear Mr. Wiley:

This letter is a partial response to your request for an opinion on the effect of recent decisions of the Supreme Court of the United States relating to voter residency requirements, on the provisions of Missouri law, and particularly Article VIII, Section 2 of the Missouri Constitution, and Section 111.021, RSMo 1969.

The effect of such Missouri state constitutional and statutory provisions is to establish a residency requirement of one year in the state, and sixty days in the county, city or town, prior to an election, in order to permit a person to vote at that election. We note that such provisions are also found in Section 118.030, RSMo, applicable to St. Louis City.

Mr. John T. Wiley

The case of Dunn v. Blumstein, 92 S.Ct. 995, decided March 21, 1972, by the Supreme Court of the United States, held invalid periods of one year's residency in the state, and three months' residency in the county, as established by the Constitution and statutes of Tennessee. The decision sustained a uniform period of thirty days for the closing of registration books, as established by state statute.

Because of the many problems under the Missouri election laws as presented by that opinion, we have commenced an action in the United States District Court for the Western District of Missouri which we hope will result in a definitive answer to the problem. Missouri, in contrast to Tennessee, does not have statewide registration of voters. Where registration exists, the statutes provide periods of twenty-eight days or four weeks for the closing of registration books, before an election. Missouri also has a residency requirement of sixty days in the county, city or town, while Tennessee has a three-month period in the county. Because of the pending litigation, we do not believe that we should issue an opinion covering the matters which will be presented to the court.

We believe that it is clear, however, that under the decision in Dunn v. Blumstein, the period of one-year's residency in the state, as established by Article VIII, Section 2 of the Missouri Constitution and Section 111.021 of the Missouri statutes, is unconstitutional and void.

We are enclosing Opinion No. 1, rendered May 25, 1938, to H. D. Allison, which held that a person who will have lived in this state a period of one year on or before the November election date is entitled to register and vote at the preceding August primary even though he has been a resident of the state for less than one year on such primary election date. Of course, as stated above, the requirement of one year's residence in the state is invalid but we believe the reasoning of the opinion is sound and that the same reasoning applies with regard to the sixty-day county, city or town residential requirement. It follows that the maximum residential period in the county, city or town that could be required before a resident is entitled to register and vote is sixty days before the November general election and, therefore, the election board should register persons who will have the required sixty-day residency in the City of St. Louis on or before the November election date. Since all residents who apply for registration on a date prior to the August 1972 primary date will clearly have a sixty-day residency before the November election date,

Mr. John T. Wiley

all residents of St. Louis City who have all other constitutional qualifications should be registered who apply before registration is closed at 5:00 p.m. on the 28th day preceding the primary election date as provided in Section 118.240, RSMo Supp. 1971.

CONCLUSION

It is the opinion of this office that:

1. The requirement of one year's residence in the state as a condition to voting established by Article VIII, Section 2 of the Missouri Constitution and Section 111.021 RSMo 1969 is unconstitutional and void.
2. If the durational requirement of sixty days residence in a county, city or town as a condition to voting is held valid by the court in the case now pending in the United States District Court for the Western District of Missouri, such duration of residence will be required as a condition for voting at the November election but such duration of residence is not required in order to vote at the preceding primary election.
3. Any otherwise qualified person who is a resident of the City of St. Louis at the time of registration, regardless of the duration of his residence, may register to vote at the primary at any time prior to 5:00 p.m. on the 28th day preceding the primary election date as provided in Section 118.240, RSMo Supp. 1971.
4. The St. Louis City Election Board should register all residents of such city who apply before 5:00 p.m. on the 28th day preceding the August 1972 primary date if they have all other constitutional qualifications. Such persons are entitled to vote in the 1972 primary.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 1
5-25-38, Allison

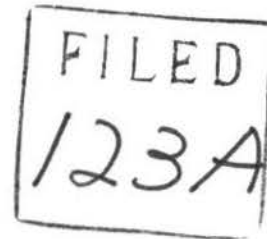
ELECTIONS:

No person who establishes residence in Missouri 28 days or less prior to a primary or general election can register or vote in places where registration is required or vote in places where registration is not required at such ensuing primary or general election.

SUPPLEMENTAL OPINION NO. 123A

July 19, 1972

Mr. John T. Wiley, Chairman
Board of Election Commissioners
City of St. Louis
208 South 12th Boulevard
St. Louis, Missouri 63102



Dear Mr. Wiley:

This opinion supplements Opinion No. 123 rendered in answer to your request for an opinion as to the effect of recent decisions of the Supreme Court of the United States relating to voter residency requirements. In such opinion this office held that the requirement of one year's residence in the state as a condition to voting established by Section 2 of Article VIII of the Constitution of Missouri and Section 111.021, RSMo, is unconstitutional and void under the ruling of the Supreme Court of the United States in the case of Dunn v. Blumstein. In such opinion we also held the durational requirement of 60 days residence in a county, city or town as a condition to voting, as provided in such constitutional and statutory provisions, is not applicable to primaries but is applicable only to general elections.

The Supreme Court of Missouri on July 12, 1972, in the case of Totton v. Murdock, No. 57976 held that the provision in Section 2 of Article VIII of the Missouri Constitution as to age is applicable to primary elections as well as general elections except as modified by the 26th Amendment to the Constitution of the United States. Specifically, the court held that persons who are not 18 years old on or before the day after a primary are not entitled to register for or vote in such primary. (Attorney General's Opinion No. 132 rendered to Kohn under date of April 24, 1972, is hereby withdrawn). In view of the fact that the Supreme Court held that requirements relating to age are applicable to voters at primary elections, it appears that the residential requirement applicable to voters also are applicable to primary elections as well as general elections. Therefore, it becomes necessary to determine whether or not the 60 days residential requirement in Section 2 of Article VIII of the Constitution of Missouri and Section 111.021, RSMo, is invalid and void under the holding of Dunn v. Blumstein, supra.

Mr. John T. Wiley

It is the opinion of this office that the residential requirement of 60 days in the city, county, or town as a condition to voting as provided for in Section 2 of Article VIII of the Constitution and Section 111.021, RSMo, is invalid, void and of no effect under the holding of the Supreme Court in the Dunn case. As pointed out in Opinion No. 123, the Supreme Court of the United States held invalid and void such residential requirements as a qualification for voting. The court in that case did uphold as a valid enactment the closing of the registration books throughout the State of Tennessee 30 days prior to an election. It is our view, therefore, that the only valid provisions in Missouri, at present, applicable to residents of this state are those statutes providing for registration. Therefore, anyone establishing residence in this state after the close of the registration period is not entitled to participate in the ensuing election. While there are slight variations as to the closing date of registration in the various cities and counties of this state, no statute provides for a closing date for registration more than 28 days before the election (e.g., Section 114.120, RSMo, applicable to county option registration). In view of the fact that it would be discriminatory to hold that persons establishing residence in areas of this state where registration is required cannot register or vote if they establish such residence within a statutory period preceding an election but that persons establishing residence in this state in areas in which registration is not required during such period can vote, it is our view that no person who establishes residence in the state within 28 days prior to an election is entitled to vote at the ensuing election.

It is our view that the maximum period during which the registration books are closed is the applicable standard to determine whether a person has established a residence in this state which entitles him to vote.

We note that Section 118.240, RSMo Supp. 1971, applicable to elections in cities of over 600,000 provides that registration for municipal elections shall close at 5 p.m. on the forty-fifth day prior to the April election. This opinion does not purport to rule on the validity of such provisions.

CONCLUSION

It is, therefore, the opinion of this office that:

1. The requirement of one year's residence in the state as a condition to voting in a primary or general election, as provided for in Section 2 of Article VIII of the Missouri Constitution and Section 111.021, RSMo 1969, is unconstitutional and void.

Mr. John T. Wiley

2. The durational residential requirement of 60 days residence in a county, city, or town as a condition to voting in primaries or general elections as provided in Section 2 of Article VIII of the Constitution of Missouri and Section 111.021, RSMo, is unconstitutional and void.

3. Any individual otherwise qualified who establishes residence in this state more than 28 days prior to the next ensuing primary or general election in an area in this state in which registration is required is authorized to register and vote at the ensuing primary or general election.

4. Any individual otherwise qualified who establishes residence in this state more than 28 days prior to the next ensuing primary or general election in an area in this state in which registration is not required is authorized to vote at the ensuing primary or general election.

5. An individual establishing residence in this state 28 days or less before a primary or general election cannot register for or vote at such primary or general election.

As pointed out in Opinion No. 123, a suit instituted by the Attorney General is now pending in federal court requesting a ruling on the 60 day constitutional and statutory requirement. This opinion will remain in effect unless it is changed, modified or otherwise affected by a court ruling on such provisions.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

SHERIFFS:
POLICE:
COUNTIES:
COUNTY OFFICERS:
COUNTY CHARTERS:

The provisions of Section 66.250, RSMo (Senate Bill 389, 76th General Assembly, Second Regular Session) requiring appointed police officers in police departments in any county of the first class having a charter

form of government to complete training or show completion of certain training courses in law enforcement or possess specified experience will apply to appointed officers in the sheriff's office of Jackson County when its Charter goes into effect January 1, 1973.

OPINION NO. 126

October 11, 1972

Honorable Jack E. Gant
Missouri Senate
9517 East 29th Street
Independence, Missouri 64052



Dear Senator Gant:

This opinion is in answer to your opinion request in which you ask:

"Will section 66.250, RSMo 1969, [sic] apply to [the sheriff's office of] Jackson County when its County Charter goes into effect January 1, 1973."

Section 66.250, Senate Bill No. 389 of the 76th General Assembly, Second Regular Session, provides:

"1. Any person appointed after September 28, 1971, to serve as a police officer in any police department in any county of the first class having a charter form of government shall, if he has not heretofore completed the training required by this subsection, within six months from the date of the appointment, cause to be filed with the prosecuting attorney of the county proof that he has satisfactorily completed a law enforcement officer training course conducted by the Federal Bureau of Investigation National Academy or the Southern Police Institute of Louisville, Kentucky, or a training course with a minimum of

Honorable Jack E. Gant

six hundred hours of instruction conducted by the county police department alone or in cooperation with any municipal police department authorized by law to operate police training courses, the state highway patrol, or any accredited course for police officers approved by such county police department; provided that any person who has successfully completed a basic police recruit training course conducted by the St. Louis County and Municipal Police Training Academy, the City of St. Louis Police Academy or the Kansas City Police Academy, or who has eight continuous years' of service and experience as a full-time police officer, shall have fulfilled the requirements of this law.

"2. Any person so appointed who fails to comply with the provisions of this section within the six months' period shall not thereafter receive any compensation nor shall he be authorized to act as a police officer until he has complied.

"3. The chief executive officer of each police department shall be responsible for the enforcement of this section, and shall notify the prosecuting attorney of the county of the appointment of any new officer not later than five days after the date of the appointment.

"4. Any person who willfully violates any of the provisions of this section is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law."

Section 66.250, RSMo 1969, referred to, "Any person hired . . . to serve as a police officer in a municipal police department in any county of the first class having a charter form of government . . ."

St. Louis County has its own police department which fulfills the police requirement for St. Louis County, State on Inf. Dalton ex rel. Shepley v. Gamble, 280 S.W.2d 656 (Mo. 1955) whereas the police function for Jackson County will be provided by the sheriff's office under Article VII of the Constitutional Home Rule Charter which authorizes the election of a sheriff and the appointment of officers by him. Thus, whether such police function is fulfilled by the sheriff's office or by the county police department makes no difference in the premises since both are "police

Honorable Jack E. Gant

departments" in our view within the language of present Section 66.250 which broadly includes "any police department in any county of the first class having a charter form of government."

Sections 18(b) and 18(e) of Article VI of the Constitution provide as follows:

- 18(b) "The charter shall provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the Constitution and laws of the state."
- 18(e) "Laws shall be enacted providing for free and open elections in such counties, and laws may be enacted providing the number and salaries of the judicial officers therein as provided by this Constitution and by law, but no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees."

The question that must be answered is whether the provisions of these constitutional provisions authorizing a county charter to make certain provisions relating to county officers and prohibiting the enactment of certain laws relating to county officers is a bar to the application of Section 66.250 to a charter county.

It is clear that Section 66.250 does not purport to provide for or affect the number, kinds or salaries of county officers or to provide for the exercise of powers or duties of county officers.

We do not believe that the provisions of Section 66.250 provide for the terms of office of county officers. The provisions of Section 66.250 simply provide that police officers in first class charter counties shall possess certain experience or training qualifications in order to continue to hold the position of policeman. Such section does not purport to affect the term of an officer any more than does a statute providing that a county officer forfeits his office upon conviction of a crime.

We do not believe that the provisions of Section 66.250 interfere with the "manner of selection" of county officers so as to bar the application of Section 66.250 to a first class charter county's appointed police officers.

Honorable Jack E. Gant

It was held in the Gamble case that sheriffs are county officers and that St. Louis County alone has the right to determine "the number, kinds, manner of selection, terms of office and salaries" of its county officers under section 18(b). We have found no precise definition of the language "manner of selection" as used in the Constitution and we are of the view that it refers primarily to whether such county officers are to be elected or appointed. In this respect it must be borne in mind that our courts have repeatedly held that the exercise of the police power is a matter of overall statewide concern. State ex rel. Reynolds v. Jost, 175 S.W. 591, 594 (Mo. 1915); State ex rel. Spink v. Kemp, 283 S.W.2d 502, 522 (Mo. 1955); State ex rel. Sanders v. Cervantes, 480 S.W.2d 888, 890 (Mo. 1972). At the same time we recognize that at least one Missouri Supreme Court opinion has indicated that the exercise of such charter powers would place such a police department beyond the control of the legislature for some purposes. Stemmler v. Einstein, 297 S.W.2d 467, 473 (Mo. 1957).

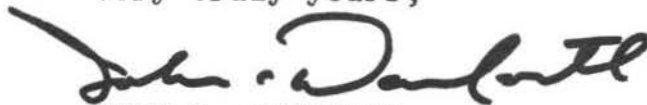
However, after an analysis of these cases and related authorities and in the absence of any clear conflict with the Constitution, we have reached the conclusion that the experience or training requirements of Section 66.250 are a valid exercise of legislative power as applied to such a county and that such a requirement does not conflict with the charter county's constitutional authority.

CONCLUSION

It is the opinion of this office that the provisions of Section 66.250, RSMo (Senate Bill 389, 76th General Assembly, Second Regular Session) requiring appointed police officers in police departments in any county of the first class having a charter form of government to complete training or show completion of certain training courses in law enforcement or possess specified experience will apply to appointed officers in the sheriff's office of Jackson County when its Charter goes in effect January 1, 1973.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General

HIGHWAY PATROL:
MOTOR VEHICLES:
MOTOR VEHICLE INSPECTION:

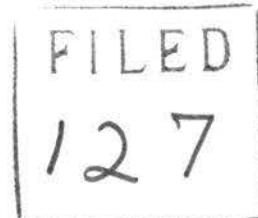
Section 307.365(5), RSMo Supp. 1971,
dealing with the refunding of moneys
for vehicle safety inspection stick-
ers of those inspection stations which

discontinue operation, are suspended or revoked, is applicable only
to those inspection stations which discontinued operation, were sus-
pended or revoked, after the effective date of Section 307.365(5),
RSMo Supp. 1971, the 28th day of September, 1971.

OPINION NO. 127

May 26, 1972

Colonel E. I. Hockaday
Superintendent
Missouri State Highway Patrol
1510 East Elm Street
Jefferson City, Missouri 65101



Dear Colonel Hockaday:

This is in reply to your request for an opinion of this office
concerning the applicability of the recently enacted Section 307.
365(5), RSMo Supp. 1971. That section, in pertinent part, reads
as follows:

" . . . [t]he owner or operator of any inspec-
tion station who discontinues operation during
the period that a station permit is valid or
whose station permit is suspended or revoked
shall return all official signs and posters
and any current unused inspection stickers,
seals or other devices to the superintendent
of the Missouri state highway patrol and shall
receive a full refund on request except for
official signs and posters, providing the re-
quest is made during the calendar year or
within sixty days thereafter in the manner
prescribed by the superintendent of the Mis-
souri state highway patrol. . . ."

In relation to the foregoing section, you ask ". . . from
what date shall the Highway Patrol honor requests for such refunds?".

The Supreme Court of Missouri has consistently stated that the
general rule of statutory construction requires a court to ascer-
tain the intent of the legislation from the language used, and to
consider all words in their ordinary and plain meaning. State ex
rel. Eaton v. Gmelich (Mo. Sup. 1907) 106 S.W. 618; State ex rel.

Colonel E. I. Hockaday

and to Use of Kolen v. Southwestern Bell Telephone Co. (Mo. Sup. 1927) 292 S.W.2d 1037; and State ex rel. Cooper v. Cloyd (Mo. Sup. 1971) 461 S.W.2d 833. Additionally, the rule is stated that statutes are construed to operate prospectively and will not generally be given retrospective application unless that intent is manifest on the face of the statute or manifest by necessary or unavoidable implication. Schulenberg & Bockler v. Campbell (Mo. Sup. 1851) 14 Mo. 491; State ex rel. Clay Equipment Corporation v. Jensen (Mo. Sup. 1963) 363 S.W.2d 666; and State ex rel. Breshears v. Missouri State Employees' Retirement System (Mo. Sup. 1962) 362 S.W.2d 571.

As you indicate, the effective date of Section 307.365(5), RSMo Supp. 1971, was the 28th day of September, 1971. Our application of the foregoing general principles involving statutory construction to section 307.365(5) fails to indicate a legislative intention manifest on the face of the statute that the provisions of this section are to be applied retrospectively. Thus, it is the conclusion of this office that Section 307.365(5) dealing with the refunding of moneys for vehicle safety inspection stickers of those inspection stations which discontinue operation, are suspended or revoked, is applicable only to those inspection stations which had discontinued operation, were suspended or revoked, after the effective date of Section 307.365(5), the 28th day of September, 1971.

CONCLUSION

It is therefore the opinion of this office that Section 307.365(5), RSMo Supp. 1971, dealing with the refunding of moneys for vehicle safety inspection stickers of those inspection stations which discontinue operation, are suspended or revoked, is applicable only to those inspection stations which discontinued operation, were suspended or revoked, after the effective date of Section 307.365(5), RSMo Supp. 1971, the 28th day of September, 1971.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Kenneth Romines.

Yours very truly,



JOHN C. DANFORTH
Attorney General

PENSIONS: A city is prohibited by Section 70.
RETIREMENT: 615, RSMo from establishing a pension
CITIES, TOWNS & VILLAGES: and retirement fund for employees who
are other than policemen or firemen
on an independent basis and not under the Lagers Retirement Plan
(Sections 70.600 to 70.760, RSMo 1969, as amended) other than
the Federal Social Security Old Age, Survivors and Disability
Insurance program, as amended, unless the city has an assessed
valuation of at least forty million dollars and does not now
have a pension system for its officers and employees adopted
pursuant to state law.

OPINION NO. 128

August 7, 1972

Honorable Don Owens
Missouri Senate
374 South Bernhardt
Gerald, Missouri 63037

FILED

128

Dear Senator Owens:

This is in response to your request for an opinion from
the office of the Attorney General with respect to the following
inquiry:

"May a city establish a pension and retire-
ment fund on an independent basis and not
under the Lagers Retirement Plan?"

The Lagers Retirement Plan, otherwise known as the Missouri
Local Government Employees' Retirement System is codified in
Sections 70.600 to 70.760, RSMo 1969, as amended. Within this
statutory scheme certain political subdivisions are prohibited
from adopting any other plan similar in purpose to the Missouri
Local Government Employees' Retirement System by Section 70.615,
RSMo 1969, which provides:

"After October 13, 1967, a political sub-
division shall not commence coverage of its
employees who are neither policemen nor fire-
men under another plan similar in purpose to
this system, other than under this system,
except the federal social security old age,

Honorable Don Owens

survivors, and disability insurance program, as amended; except that any political corporation or subdivision of this state, now having or which may hereafter have an assessed valuation of forty million dollars or more, which does not now have a pension system for its officers and employees adopted pursuant to state law, may provide by proper legislative action of its governing body for the pensioning of its officers and employees and the widows and minor children of deceased officers and employees under a plan separate and apart from that provided in sections 70.600 to 70.760 and appropriate and utilize its revenues and other available funds for such purposes." (Emphasis added)

As this language indicates a city, being a political subdivision, under the definition of "political subdivision" in Section 70.600(19), RSMo Supp. 1971, may not establish an independent retirement plan unless such city has an assessed valuation of forty million dollars or more, and does not now have a pension system for its officers and employees adopted pursuant to state law. (See also Section 67.200, RSMo, which generally authorizes political subdivisions having over forty million dollars assessed valuation to pension its officers and employees, and widows and minor children of deceased officers and employees). However, a political subdivision is not prohibited by Section 70.615 from adopting an independent plan if the coverage of the plan is limited to policemen or firemen. Also, the Federal Social Security Old Age, Survivors and Disability Insurance program is excepted from the prohibition of Section 70.615, RSMo 1969.

CONCLUSION

It is the opinion of this office that a city is prohibited by Section 70.615, RSMo from establishing a pension and retirement fund for employees who are other than policemen or firemen on an independent basis and not under the Lagers Retirement Plan (Sections 70.600 to 70.760, RSMo 1969, as amended) other than the Federal Social Security Old Age, Survivors and Disability Insurance program, as amended, unless the city has an assessed valuation of at least forty million dollars and does not now have a pension system for its officers and employees adopted pursuant to state law.

Honorable Don Owens

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard S. Paden.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

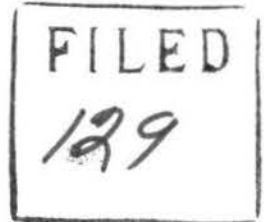
JOHN C. DANFORTH
Attorney General

CONSTITUTIONAL LAW: Article XII, Section 2(b) of the Con-
INITIATIVE AND REFERENDUM: stitution of Missouri provides that
constitutional amendments proposed by
initiative shall be voted on at the next general election (more
than four months from the date of filing) or at a special elec-
tion called by the Governor prior thereto. The circulators of
the petition have no power to designate the date of the election
at which the amendment is to be voted. If an initiative petition
contains an election date, such petition is ineffective to autho-
rize the submission of the measure at a date later than the date
specified in the petition.

OPINION NO. 129

September 20, 1972

Honorable James G. Baker
State Representative
104 East 41st Street
Kansas City, Missouri 64111



Dear Representative Baker:

This is in response to your request for an opinion on the
following questions:

- "1. In petitions seeking to invoke the power
of initiative under 126.030 RSMo. can the
circulators designate a special election
at which shall be submitted an amendment
to the constitution to the qualified voters
of the state of Missouri, on a specific
date that is binding?
- "2. In petitions seeking to invoke the power
of initiative under 126.030 RSMo. are the
circulators required to designate the
specific date of the general election at
which shall be submitted an amendment to
the constitution to the qualified voter
of the state of Missouri?
- "3. In petitions seeking to invoke the power
of initiative under 126.030 RSMo. may the
circulators word the petition so that the
amendment to the constitution shall be
submitted to the qualified voters of the
state of Missouri, for their approval or

Honorable James G. Baker

rejection, at the first election, general or special, following four months after the date of the petition has been submitted to the Secretary of State of the state of Missouri?"

When amendments to the Constitution of the state are proposed by initiative, Article XII, Section 2(b) contains explicit direction as to when the election on the amendment is to be held. It provides:

"All amendments proposed by the general assembly or by the initiative shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election, or at a special election called by the governor prior thereto, at which he may submit any of the amendments. . . ."

Nowhere does the Constitution provide for the circulators or signers of a petition to designate the date of the election of which the proposed amendment is to be submitted to the voters.

Section 126.030, RSMo 1969 was repealed by Laws 1971, Senate Bill No. 56. However, a new section was enacted by Senate Bill No. 56 which is now Section 126.031, RSMo Supp. 1971. That section contains a suggested form for petitions which is substantially similar to the form set out by the repealed Section 126.030. Section 126.031, RSMo Supp. 1971, provides:

"The following shall be substantially the form of petition for any law or amendment to the Constitution of the state of Missouri proposed by the initiative:

Congressional District No. ____

Sheet No. ____

It is a felony for anyone to sign any initiative or referendum petition with any other name than his own, or knowingly to sign his name more than once for the measure, or to sign such petition when he is not a qualified voter.

INITIATIVE PETITION

Honorable James G. Baker

To the Honorable _____, Secretary
of State for the state of Missouri:

We, the undersigned, citizens and qualified voters of the state of Missouri and the _____ congressional district, respectfully demand that the following proposed law (or amendment to the constitution, as the case may be) shall be submitted to the qualified voters of the state of Missouri, for their approval or rejection, at the general (special) election to be held on the _____ day of _____, A.D. 19____, and each for himself says: I have personally signed this petition; I am a qualified voter of the state of Missouri, and the _____ congressional district; my street address and the name of the city, town or village where I live are correctly written after my name.

Name _____, street address _____,
city, town or village _____ Zip code _____.

(Here follow numbered lines for signatures.)"

In view of the fact that Article XII, Section 2(b) contains expressed provision as to the date of the election at which the proposed constitutional amendment is to be submitted to the voters, we believe the General Assembly has no power to designate a different manner to determine the date of election at which the proposition is to be submitted to the voters. Consequently, any provision in Section 126.031, RSMo Supp. 1971 which could be interpreted as permitting the circulators or signers of the petition to select the election at which the proposed amendment is to be voted on is void as being contrary to Article XII, Section 2(b) of the Constitution.

Your attention is directed to Opinion No. 440, 1970, where this office held:

"We understand that the petitions which occasioned this particular inquiry state that the proposition, which the petitioners sought to have submitted to the electorate, was to be voted on at the November 3, 1970 general election or at a special election to be called by the Governor. Under Article XII, Section 2(b), the Governor could only call a special

Honorable James G. Baker

election prior to the general election held on November 3, 1970 to vote on the proposed amendment. Therefore, we interpret the reference to a special election called by the Governor on the petitions to refer to a special election called before November 3, 1970. Consequently, it appears that the signers of the petitions contemplated that the proposition would be submitted to the voters on or before November 3, 1970. Inasmuch as the signers of the petitions, as is evident from the face of the petitions, did not intend to have the proposition submitted any later than November 3, 1970, those petitions are ineffective as petitions proposing a constitutional amendment at some election after the general election held on November 3, 1970."

Thus, while the circulators or signers of a petition proposing a constitutional amendment have no power to designate the date of the election at which the amendment is to be voted on, that designation will be taken as an expression of intent by the signers of the petition to have the proposed amendment submitted to the electorate on, or before, the date therein designated and such petition is ineffective to cause the matter to be voted on at a later time.

Article III, Section 50 of the Constitution provides in part: "Every such petition shall be filed with the secretary of state not less than four months before the election . . ." Thus a petition filed with the Secretary of State less than four months before a general election is ineffective to cause the proposed amendment to be voted on at that next general election. To harmonize the four month provision of Article IV, Section 50 with the requirement of Article XII, Section 2(b) that the proposed amendment is to be voted on at the next general election requires that the reference to the next general election in Article XII, Section 2(b) be read as referring to the next general election at which the amendment may be voted on. Therefore if a petition is filed less than four months before a general election, the proposition is to be voted on at the general election next following the general election which will occur less than four months after filing unless submitted at a special election designated by the Governor more than four months after filing with the Secretary of State.

To specifically answer your questions:

1. Circulators of a petition proposing a constitutional amendment have no power to designate a special election at which

Honorable James G. Baker

the proposed amendment is to be submitted since Article XII, Section 2(b) places the power to call a special election to consider a proposed constitutional amendment solely in the hands of the Governor.

2. The circulators of a petition proposing a constitutional amendment are not required to designate the specific date of the general election at which the amendment is to be submitted to the voters since the date of the general election at which the proposition is submitted is determined by the date the petition is filed.

3. There is no need to word a petition to provide that the amendment to the Constitution shall be submitted to the qualified voters of the State of Missouri at the first election, general or special, four months after the petition has been submitted to the Secretary of the State of Missouri, for the reason that the proposition will be submitted at the first general election four months after the proposition has been filed with the Secretary of State, unless the Governor designates a special election prior thereto; and the circulators have no power to designate a date for a special election.

CONCLUSION

It is, therefore, the opinion of this office that Article XII, Section 2(b) of the Constitution of Missouri provides that constitutional amendments proposed by initiative shall be voted on at the next general election (more than four months from the date of filing) or at a special election called by the Governor prior thereto. The circulators of the petition have no power to designate the date of the election at which the amendment is to be voted. If an initiative petition contains an election date, such petition is ineffective to authorize the submission of the measure at a date later than the date specified in the petition.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Very truly yours,

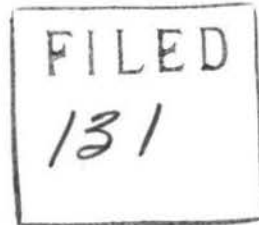
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JOHN C. DANFORTH
Attorney General

April 20, 1972

OPINION LETTER NO. 131
Answer by Letter - Klaffenbach

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This letter is in answer to your opinion request in which you ask:

"Section 120.370, RSMo 1969, provides, in part:

'No person shall file a written declaration of candidacy for more than one office to be filled at the next general election, . . .'

"Where a candidate:

1. files a declaration of candidacy for a county elective office to be filled at the November general election;
2. then, without withdrawing such declaration, files a declaration of candidacy with this office for a state-wide elective office to be filled at the same election;
3. then, files a withdrawal of his declaration of candidacy for the county office, and then;
4. files a new declaration of candidacy for the state-wide office;

which declaration filed with this office should be used to determine the order in which the candidate's name shall appear on the certificate made by this office pursuant to Section 120.380?"

Honorable James C. Kirkpatrick

You also state:

"On January 20, 1972, a written declaration of candidacy was filed in this office for a state-wide elective office to be filled at the November 1972 General Election.

"We are now advised that the same candidate had previously filed a declaration of candidacy for a county elective office which is also to be filled at the November 1972 General Election.

"We are further advised that subsequent to January 20, 1972 and before April 4, 1972, a withdrawal of the declaration of candidacy for the county office was filed by the candidate.

"Following the withdrawal, and on April 4, 1972, the candidate filed a new declaration of candidacy for the same state-wide office."

We assume that the withdrawal of candidacy for the county office which you mention was made in accordance with the provisions of Section 120.375, RSMo Supp. 1971.

While we do not here consider what the situation would be if the second declaration of candidacy for statewide office had not been filed, it is our view that, in the premises, the last such declaration of candidacy for state office is the one to be considered.

Very truly yours,

JOHN C. DANFORTH
Attorney General

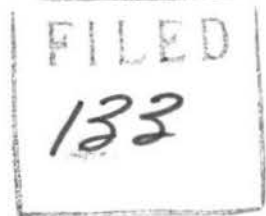
ELECTIONS:

Section 118.510, RSMo 1969 is valid.

OPINION NO. 133

May 22, 1972

Mr. John T. Wiley, Chairman
Board of Election Commissioners
City of St. Louis
208 South 12th Boulevard
St. Louis, Missouri 63102



Dear Mr. Wiley:

Your recent opinion request referred to an annotation that appears both in the Election Laws booklet published by the office of the Secretary of State and in the Missouri Revised Statutes 1969. This annotation, beneath Section 118.510, RSMo 1969 states:

"This section, held invalid under the equal protection provisions of the state and federal constitutions because it provides for the keeping of challengers at registration and voting places by the two major parties only. Preisler v. Calcaterra, 362 Mo. 662, 243 S.W. (2d) 62."

Your question is, in view of the decision in Preisler v. Calcaterra, 243 S.W.2d 62 (Mo. banc 1951), is Section 118.510, RSMo 1969, to be held invalid?

The Missouri Supreme Court's decision in Preisler v. Calcaterra clearly stated that the entire section was invalid. The Missouri Supreme Court, at 243 S.W.2d 66, stated:

"We must, therefore, hold Section 118.510 unconstitutional as an arbitrary violation of the equal protection provisions of our State and Federal Constitutions. . . ."

The Court thus held, in 1951, that the then existing statute limiting to the two dominant political parties the right or privilege of designating and keeping their challengers and watchers at elections was violative of the equal protection provisions of the federal and state constitutions.

Mr. John T. Wiley

The Court considered whether the constitutionally infirm provisions of Section 118.510 necessitated the finding of non-constitutionality of the entire provision or whether the remaining provisions were severable and in force. The Court explained its decision that the entire statute was unconstitutional and void as follows:

" . . . However, if the elimination of such clauses leaves the remaining portions of this statute so that they do not express the true legislative intent but are instead in conflict with it, the statute should not be upheld.
 . . .

"It seems obvious that to strike out these clauses [the unconstitutional provisions] in Section 118.510 would broaden its scope as to subject matter because it would make it include all political parties in its authorization for challengers and watchers when the clear legislative intent was to confine it to only two. We must, therefore, declare the whole section unconstitutional.
 . . ." 243 S.W.2d 66.

The Court did not create a gap in this area and leave the City of St. Louis without any law providing for challengers and watchers. After reviewing the legislative history of Section 118.510, it concluded that " . . . Section 49 of the Act of 1921, Section 10613, RS 1929, is still in force and effect as to the City of St. Louis." 243 S.W.2d 66.

In 1957, the General Assembly of the State of Missouri repealed Section 118.510, RSMo 1949, the provision declared unconstitutional by the Missouri Supreme Court, and enacted in lieu thereof, a new Section 118.510, Laws 1957, p. 768. This provisions supplanted Section 10613, RS 1929. The new Section 118.510 is found in the Election Laws book issued by the office of the Secretary of State and may also be found in the Revised Statutes of Missouri, 1969 edition. The new Section 118.510 omits the provisions relating to challengers and poll watchers found unconstitutional by the Court in Preisler. It does not restrict challengers to the two major parties only. Subparagraph 1 of the new section permits each political party named on the ballot to designate and keep challengers at polling places. It further provides, in subsections 2 and 3, for the participation of challengers representing each party named on the ballot and other aspects of the voting process previously restricted to those challengers of the two major parties only.

Mr. John T. Wiley

By permitting the presence of challengers representing all parties on the ballot, the new Section 118.510 avoids the constitutional infirmity discussed in the Preisler v. Calcaterra decision. Therefore, the new Section 118.510 enacted by House Bill No. 213 of the 69th General Assembly in 1957 is valid and in effect in the City of St. Louis.

CONCLUSION

It is the opinion of this office that Section 118.510, RSMo 1969 is valid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Peter H. Ruger.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a continuous script.

JOHN C. DANFORTH
Attorney General

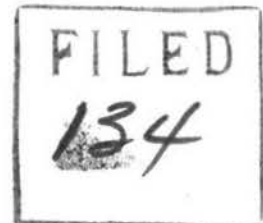
ELECTIONS:
CANDIDATES:
SHERIFFS:
COUNTY CLERK:

A person is not eligible for the office of sheriff unless he has resided in the county for more than one whole year next before filing for said office whether he files by declaration of candidacy or by nominating petition. The time for such filing is on or before five p.m. on the last Tuesday of April preceding the primary. The clerk of the county court may refuse the filing of such a person who does not possess the requisite residency eligibility.

OPINION NO. 134

May 17, 1972

Honorable Bernard W. Gorman
Prosecuting Attorney
Atchison County
102 South 3rd Street
Tarkio, Missouri 64491



Dear Mr. Gorman:

This opinion is in answer to your opinion request in which you ask:

- "a) May a person desiring to become a candidate for sheriff, and not having resided in the county a year immediately prior to the last day for filing a declaration of candidacy, file nominating petitions as an independent instead of filing a declaration of candidacy?
- "b) Must he file the nominating petitions on or before the last day for filing a declaration of candidacy, or must he file the nominating petitions within the limits established by Section 120.220? There seems to be a contradiction between the provisions of 120.220 and 120.240.
- "c) Is the one year residency before filing a disqualifying provision so that having failed that requirement he is ineligible for the office should he be elected. The ultimate question being, is this person

Honorable Bernard W. Gorman

ineligible because of his failure to meet the residency requirement and therefore may not be a candidate even though he files the nominating petitions at the proper time?"

You also state that:

"A person established residence in Atchison County, Missouri on August 1, 1971, and has continued to live in the county since that date. He desires to become a candidate for sheriff of this county. He has circulated petitions, apparently in the proper form, signed by the requisite number of voters. His petitions state that he is a candidate on the independent ticket. His eligibility other than the residency requirement is unquestioned. Section 57.010 provides that a candidate for sheriff 'shall have resided in said county for more than one whole year next before filing for said office. . . .'

"The County Clerk is doubtful that he should accept the nominating petitions at any time because of the question of eligibility of the candidate, or having accepted them place the candidate's name on a ballot."

Section 57.010, RSMo 1969, with respect to the eligibility requirements for the office of sheriff, states in part:

". . . Such person shall be a resident taxpayer and elector of said county, shall have resided in said county for more than one whole year next before filing for said office and shall be a person capable of efficient law enforcement. . . ."

The provision with respect to the filing of such candidate for a countywide office is contained in Section 120.240, RSMo 1969, which states in part:

"1. No person's name shall appear on a general election ballot as an independent candidate whose petition for such status shall not have been submitted to the proper officer by whatever time may be fixed by law as the final date for filing as a candidate in a party primary."

Honorable Bernard W. Gorman

Section 120.240, above quoted, must be distinguished from Section 120.220 which states:

"Petitions of nomination for the nomination of candidates for offices in cities and other political subdivisions shall be filed with the clerk or other proper officer or board of the political subdivision at least sixty-eight days prior to the day of election. No such petitions of nomination shall in any event be filed more than eighty-five days before the day of the election."

By comparison Section 120.220, RSMo 1959 stated:

"Petitions of nomination under sections 120.140 to 120.230 for the nomination of candidates for offices to be voted upon by the electors of the entire state, or any district larger than a county, shall be presented to the secretary of state at least seventy-eight days previous to the day of election for which the candidates are nominated. All other petitions for nomination of candidates shall be filed with the county clerk of the respective counties at least seventy-eight days previous to the day of election; except that petitions of nomination for nomination of candidates for the offices in cities and other political subdivisions shall be filed with the clerk or other proper officer or board of the political subdivision at least sixty-eight days previous to the day of election. No such petitions of nomination shall in any event be filed more than eighty-five days before the day of election. (Emphasis added)

The underscored portions indicate clearly that county offices were considered separate from those of "cities and other political subdivisions." The reference to filing petitions with the county clerk for county offices was deleted when the section was amended and only the provisions applicable to "cities and other political subdivisions" were reenacted. Laws 1969, page 237. Therefore, we believe that the provisions of Section 120.220, RSMo 1969 are not applicable to petitions for county offices. Our conclusion is that Section 120.240 refers to candidates for county offices and therefore the petitions must be filed by the "time . . . fixed by law as the final date for filing as a candidate in a party primary."

Section 120.340, RSMo 1969, states in part that:

Honorable Bernard W. Gorman

"No candidate's name shall be printed upon any official ballot at any primary election unless the candidate has on or before five p.m. prevailing local time on the last Tuesday of April preceding the primary filed a written declaration of candidacy, . . ."

Therefore, if the candidate for the office of sheriff has not resided in such county for more than one whole year next preceding the last Tuesday in April preceding the primary he is, under Section 57.010, not eligible for the office of sheriff.

With respect to the question of whether or not the clerk can refuse the filing of such a candidate, it is our view that our Opinion No. 87, dated April 11, 1972 to Usrey, enclosed, answers your question and that the clerk may refuse to place the name of a candidate he believes to be ineligible on the ballot.

CONCLUSION

It is the opinion of this office that a person is not eligible for the office of sheriff unless he has resided in the county for more than one whole year next before filing for said office whether he files by a declaration of candidacy or by nominating petition. The time for such filing is on or before five p.m. on the last Tuesday of April preceding the primary. The clerk of the county court may refuse the filing of such a person who does not possess the requisite residency eligibility.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 87
4/11/72, Usrey

NAMES:
BALLOTS:
ELECTIONS:
CANDIDATES:

A candidate cannot have the nickname "Judge" appear before his name, or in parenthesis in his name, on the ballot because such nickname is a descriptive appellation.

OPINION NO. 137

April 25, 1972

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This opinion is in response to your request in which you ask:

"Whether the nickname 'Judge' should be certified as part of a candidate's 'name' under Section 120.380, RSMo 1969."

Section 120.380, RSMo 1969, to which you refer provides:

"At least eighty-five days before any primary election, the secretary of state shall transmit to each county clerk a certified list containing the name and post-office address of each person who has filed declaration of candidacy in his office and is entitled to be voted for at the primary election, together with a designation of the office for which he is a candidate and the party or principle he represents."

In our Opinion No. 257 dated May 9, 1968, copy enclosed, we advised you that the phrase and letters, "(Mr. Econ CDOSA)" could not appear on the ballot because they were purely descriptive. We believe that the reasoning employed in that opinion is applicable in this instance. The word "Judge" indicates certain judicial or administrative accomplishments either as a present or a past fact and is a descriptive appellation that likely will be misleading to the voters. That is, even if we accept as fact that the candidate has the nickname of "Judge" and agree that nicknames generally can be used in a proper manner for the purpose of properly identifying the candidate to the electorate, it is our view that it is not permissible for a candidate to use a nickname on such ballot when the nickname gives the electorate the impression that such candidate has, as in this instance, certain skills or otherwise patently connotes certain attributes.

Honorable James C. Kirkpatrick

While we adhere to the philosophy that each case should be judged on its own merits, the clear principle to be noted is that the only purpose in permitting nicknames on the ballot is to identify the candidate to the voters. When such identification becomes misleading, it cannot be permitted.

In this instance, you have further informed us that the candidate has requested that his name appear on the ballot as: "Judge" Wm. Roy Bean. Many people would no doubt recognize that the historical character known as Roy Bean was a judge of sorts. However, we believe that the nickname as a characterization of a person with judicial experience is objectionable and should not be permitted on the ballot as requested or in parenthesis.

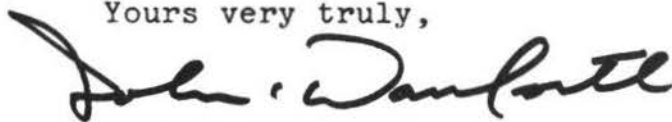
We also enclosed Opinions No. 159 dated April 18, 1962, to Hearnese and No. 63 dated February 29, 1940, to Mooney relative to your question.

CONCLUSION

It is the opinion of this office that a candidate cannot have the nickname "Judge" appear before his name, or in parenthesis in his name, on the ballot because such nickname is a descriptive appellation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 257
5-9-68, Kirkpatrick

Op. No. 159
4-18-62, Hearnese

Op. No. 63
2-29-40, Mooney

April 27, 1972

OPINION LETTER NO. 139
Answer by letter-Wood

Honorable Richard M. Webster
Senator, District 32
Room 434, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Webster:

This is in response to your opinion request of recent date posing the following questions relating to the organization and composition of legislative district political party committees and the Seventh Congressional District political party committee.

1. Where does the organization of the legislative district committees take place and who is entitled to vote there?

We are enclosing a copy of Attorney General's Opinion No. 256, July 27, 1962, to Senator William Baxter Waters which expressed the view that legislative district committees are to be composed of committeemen and committeewomen elected in the several wards and townships included in whole or in part in such district. The opinion also points out that the statute requires the members of the legislative district committee to elect a chairman and vice-chairman at the same time as the county committee meeting is held, the third Tuesday in August. We see no reason why the legislative district committee should not meet, organize, and elect its officers at the same place as the county committee on that date.

However, since none of the counties in your senatorial district have "more than one

Honorable Richard M. Webster

legislative district," legislative district committees would not be organized in these counties (Section 120.810(1), RSMo 1969).

2. How many members will Jasper, Newton, and Lawrence Counties send to the Seventh Congressional District committee in view of the fact that Jasper County has one entire legislative district and two partial legislative districts; Newton County has three partial legislative districts; and Lawrence County has three partial legislative districts?

We are enclosing a copy of Attorney General's Opinion No. 83, August 20, 1968, to Representative George W. Parker; Attorney General's Opinion No. 368, August 7, 1969, to Senator Edward Stone; and Attorney General's Opinion No. 83, January 15, 1970, to Representative Harold Dickson, which reflect the view that a congressional district committee is composed of the county committee chairman and vice-chairman of counties wholly within the congressional district; the legislative district committee chairman and vice-chairman of legislative districts in counties with at least two whole legislative districts; and the township committeemen and committeewomen of townships wholly or partially in the congressional districts in counties only partially in the congressional district.

Therefore, we are of the opinion that Jasper County, Newton County, and Lawrence County would each be entitled to only two memberships in the Seventh Congressional District committee (See Section 128.274, RSMo 1969)

Because your letter also suggests a question as to the applicability of the "one-man one-vote" doctrine to the election of political party committee members, we are enclosing a copy of Attorney General's Opinion No. 234, August 18, 1971, to Representatives Les Langsford and J. H. Frappier concluding that the doctrine does not apply.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Honorable Richard M. Webster

Enclosures: Op. No. 256
7-27-62, Waters

Op. No. 83
8-20-68, Parker

Op. No. 368
8-7-69, Stone

Op. No. 83
1-15-70, Dickson

Op. No. 234
8-18-71, Langsford and Frappier

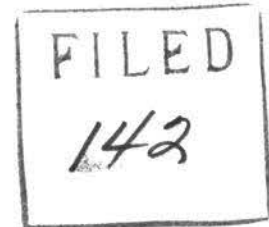
APARTMENT HOUSES:
CITIES, TOWNS & VILLAGES:
TAXATION (CITIES, TOWNS
& VILLAGES):

A third class city cannot levy a
business license tax upon apart-
ment buildings.

OPINION NO. 142

June 19, 1972

Honorable Joe F. Rains
Representative, District 115
700 East 10th
Sedalia, Missouri 65301



Dear Representative Rains:

This opinion is in response to your request in which you ask
the following:

"Whether a third class city under Chapter 77,
RSMo, may levy a business license tax upon
apartment building and determine the rate of
tax by the number of apartment units."

Your request presents two questions, first, whether a third
class city organized under Chapter 77, RSMo, may levy a business
license tax upon apartment buildings, and secondly, whether this
tax may be determined by the number of apartment units. Since the
answer to the first question is no, it will not be necessary to
deal with the second question.

Section 71.610, RSMo 1969, provides that:

"No municipal corporation in this state shall
have the power to impose a license tax upon
any business avocation, pursuit or calling,
unless such business avocation, pursuit or
calling is specially named as taxable in the
charter of such municipal corporation, or
unless such power be conferred by statute."

A municipal corporation then has no authority to impose a li-
cense tax upon any business or pursuit unless such power is con-
ferred by statute. Airway Drive-In Theatre Co. v. City of St. Ann,
354 S.W.2d 858 (Mo. banc 1962). Further, a municipality has no
inherent power to tax, such power rests in the state primarily and
may be conferred on a municipality by the Constitution or by stat-
ute. City of Bolivar v. Ozark Utilities Co., 191 S.W.2d 368 (Spr.
Ct.App. 1945).

Honorable Joe F. Rains

Section 94.110, RSMo 1969, controls the power of a third class city to levy license taxes on various businesses. This statute provides the third class city with the power and authority to levy and collect certain taxes. The subjects of the tax are specifically enumerated in the statute which is hereinafter set out so as to illustrate the specific nature of the statute. Section 94.110 is as follows:

"The council shall have power and authority to levy and collect a license tax on wholesale houses, auctioneers, architects, druggists, grocers, banks, brokers, wholesale merchants, merchants of all kinds, confectioners, delivery trucks, ice trucks, transfer trucks, laundry wagons, milk wagons, merchant delivery companies, cigar and tobacco stands, hay scales, wood dealers, coal dealers, lumber dealers, real estate agents, loan companies, abstractors, abstract agencies, loan agents, collection agencies, undertakers, public buildings, office buildings, public halls, public grounds, concerts, photographers in office or upon the streets, canvassers, artists, drummers, patent right dealers, automobile agents and dealers, automobile accessory dealers, insurance companies, insurance agents, taverns, hotels, rooming houses, boardinghouses, health schools, telephone companies, street contractors, paper hanger contractors, painting contractors, plastering contractors, and all subcontractors, flour mills, express company agencies, wagons, buggies, carriages, tinnerns, barbers, barber-shops, hair dressers, hair dressing shops, whether conducted in connection with other business or separate beauty parlors, tailors, florists, nursery stock agents, bookbinders, monument dealers and agencies, manufacturing agents, shoe cobbler shops, storage warehouses, shoe shining parlors, newspaper offices, job printing plants, ready-to-wear clothing agencies, tailor-made clothing agencies, sewing machine agents, piano and organ dealers and agents, foreign coffee and tea dealers and agents, and all other vocations whatsoever, and fix the rate of carriage of persons and wagonage, drayage and cartage of property; and to levy and collect a license tax and regulate hawkers, peddlers, pawn-brokers, restaurants, butchers, wholesale butchers, bathhouses and masseurs, lunch stands, lunch

Honorable Joe F. Rains

counters, lunch wagons, soft drink and ice cream stand and vendors, ice cream parlors, peanut and popcorn stands, and stands of every kind, hucksters, opera houses, moving picture shows, private parks, public lectures, public meetings, baseball parks, outdoor advertising, horse and cattle dealers, stockyards, wagon yards, auto yards, oil stations, wholesale and retail, inspectors, gaugers, mercantile agents, manufacturing and other corporations, or institutions, machine shops, blacksmith shops, foundries, sewer contractors, building contractors, stone contractors, plumbing contractors, brick contractors, cement contractors, sidewalk contractors, bridge contractors, and all subcontractors, street railroad cars, light, power and water companies, gas companies, laundries, laundry agencies, ice plants and ice plant agencies, ice dealers, omnibuses, automobiles, automobile trailers, tractors, carts, drays, milk wagons, laundry wagons, delivery wagons, transfer and job wagons, ice wagons, and all other vehicles, traveling and auction stores, plumbers, pressing establishments, installment houses and agencies, produce and poultry dealers, feather renovators, bakers and bakeries, bakery delivery wagons, and delivery autos, bottling works, dye works, clearing establishments, sand plants, steam fitters, corn doctors, chiropodists, hackmen, taxicabs, buses, draymen, omnibus drivers, porters, ferries, and to regulate the same, and the landing thereof, within the limits of the city, and all others pursuing like occupations; and to levy and collect a license tax, regulate, restrain, prohibit and suppress ordinaries, money brokers, money changers, intelligence and employment offices and agencies, public masquerades, balls, street exhibitions, dance halls, fortune tellers, pistol galleries, shooting galleries, palmists, private venereal hospitals, museums, menageries, equestrian performances, flourescopic views, picture shows, telescopic views, lung testers, muscle developers, magnifying glasses, ten pin alleys, ball alleys, bowling alleys, billiard tables, pool and other tables, miniature golf courses, theatrical or other exhibitions, boxing and sparring exhibitions, shows and amusements, amusement parks, and the sale of unclaimed goods

Honorable Joe F. Rains

by express companies or common carriers, auto wrecking shops, bill posters, junk dealers, porters, carnival and street fairs, circuses and shows, for parade and exhibition, or both, skating rinks, and runners and solicitors for steamboats, cars, stages, taxicabs, hotels, rooming houses, boardinghouses, bathhouses, masseurs, health schools, and all other vocations and business whatsoever, and all other pursuing like occupations."

This specific enumeration does not list apartment buildings.

In interpreting this statute it must be remembered that a fundamental rule in the construction of statutes is embodied in the maxium, "expressio unius est exclusio alterius," which means that the express mention of one thing, person or place implies the exclusion of another. City of Hannibal v. Minor, 224 S.W.2d 598 (St.L.Ct.App. 1949). Statutes and ordinances imposing licenses and business taxes are to be construed liberally in favor of the citizen and strictly against the authority attempting to tax. City of Odessa v. Borgic, 456 S.W.2d 611 (K.C.Ct.App. 1970). Since the municipality has no inherent power to tax any doubt as to the delegation to or existence of such power in the city, must be resolved against the city. The City of St. Charles v. St. Charles Gas Company, 185 S.W.2d 797 (Mo. 1945).

In Section 94.110 only the words "hotels, rooming houses, boardinghouses" are even vaguely related to apartment buildings. No cases could be found which defined apartment buildings, hotels, rooming houses, or boardinghouses to be synonymous. Black's Law Dictionary defines an apartment house as, a building arranged in several suites of connecting rooms, each suite designed for independent housekeeping. An apartment building has been held to be unlike a hotel in that an apartment building is used as a dwelling for several families living separately, while a hotel is a building held out to the public as a place where all transients will be entertained as quests for compensation. Satterthwait v. Gibbs, 135 A. 862 (Pa. 1927). Further a hotel has been defined by Black's Law Dictionary as an inn, a public house or tavern which is open to the traveling public, who remain there as guests for compensation, furnished with food, drink, lodging, etc. An extensive definition of hotel along these lines is provided by the case of Juengel v. City of Glendale, 164 S.W.2d 610 (St.L.Ct.App. 1942). According to Black's Law Dictionary, a boarder is one who makes a special contract for food with or without lodging, therefore a boardinghouse is defined as a house where boarders are kept. Further a boardinghouse can be compared to an inn or restaurant. The St. Louis Court of Appeals has accepted the definition of a boarder as one to whom

Honorable Joe F. Rains

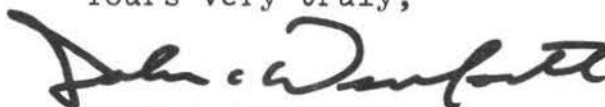
meals are supplied with or without rooms. Jackson v. Engert, 453 S.W.2d 615 (St.L.Ct.App. 1970). Finally, Black's Law Dictionary defines a roomer as one who rents a room or rooms in a house, therefore a rooming house would be a house providing lodging for roomers. That is, a rooming house is merely a house or building where one or more bedrooms which the proprietor can spare for the purpose of lodgings are made available to such persons as he chooses. However, the rooming house is not open to the public for lodging on demand. A rooming house differs from a boardinghouse in that a rooming house does not serve meals. City of Independence v. Richardson, 232 P. 1044 (Kans. 1925). From these definitions it is apparent that apartment buildings are not included in this specific list of businesses which a third class city can levy license taxes upon. Therefore, we must hold that the city does not have the power to levy a business license tax on apartment buildings.

CONCLUSION

It is the opinion of this office that a third class city cannot levy a business license tax upon apartment buildings.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Preston Dean.

Yours very truly,

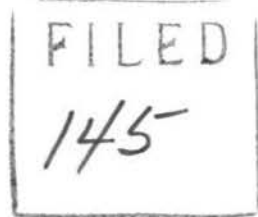


JOHN C. DANFORTH
Attorney General

May 4, 1972

OPINION LETTER NO. 145
Answer by letter-Wood

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

At your request and as directed by Section 125.030, RSMo, I herewith submit an official ballot title for the proposed constitutional amendment set forth in House Joint Resolution No. 80 of the 76th General Assembly.

Authorizing the General Assembly to provide:

- (1) For exemption from taxation of:
 - (a) Household goods and articles of personal use;
 - (b) Part of the valuation of real property owned as a homestead by persons over the age of 65;
 - (c) Intangible property owned by individuals, labor, agricultural and horticultural organizations, not for profit corporations, and hospitals exempt from the state income tax.
- (2) For the restitution to the respective political subdivisions of revenue lost by reason of such exemption.

Honorable James C. Kirkpatrick

- (3) Financial relief to persons over the age of 65 who occupy rental property as their homes.

Yours very truly,

JOHN C. DANFORTH
Attorney General

COUNTIES: Counties may cooperate with each other
COOPERATIVE AGREEMENTS: and expend county funds under the provisions of Section 70.210, RSMo 1969 et seq., within appropriate limitations, by becoming members of an association of counties for the purposes of research in the field of local government, providing training for county officials, providing information for the efficient operation of county government and supporting or opposing legislation affecting such counties.

OPINION NO. 146

May 19, 1972

Honorable Harold F. Reisch
State Representative, District 119
1013 Falcon Drive
Columbia, Missouri 65201



Dear Representative Reisch:

This opinion is in answer to your request in which you ask:

- "1. Is there legal authority permitting counties in Missouri to join and contribute to an organization known as the Missouri Association of Counties?
2. Can such an organization use taxpayer funds for the salary of an Executive Director?
3. Can such an organization take part in legislative action on specific legislative proposals?"

You also state that:

- "1. The Association of County Judges of Missouri wishes to re-organize itself and adopt by-laws as the Missouri Association of Counties for the following purposes: To strive to represent the best interest of the taxpayers of the counties of Missouri at all times through
a) research in the field of local government;
b) providing training to county officials; c) providing information and materials to permit the more efficient operation of county government; and d) to represent the taxpayers in the General Assembly by working on legislation beneficial to the counties.

Honorable Harold F. Reisch

2. A number of set [sic] counties either have been or are current members of the National Association of Counties and pay a membership fee from General Revenue to that organization.

3. At least one county currently is a member of the Missouri Municipal League which would appear to be a counter-part for the cities in this area of concern."

You have also submitted to us a copy of the Constitution and bylaws of the Missouri Association of Counties, adopted February 10, 1972. We will not undertake to pass upon all the provisions contained therein and will confine our attention to the specific questions you have asked.

The applicable Missouri constitutional provisions are Section 14 of Article VI and Section 16 of Article VI.

Section 14 provides:

"By vote of a majority of the qualified electors voting thereon in each county affected, any contiguous counties, not exceeding ten, may join in performing any common function or service, including the purchase, construction and maintenance of hospitals, almshouses, road machinery and any other county property, and by separate vote may join in the common employment of any county officer or employee common to each of the counties. The county courts shall administer the delegated powers and allocate the costs among the counties. Any county may withdraw from such joint participation by vote of a majority of its qualified electors voting thereon."

Section 16 provides:

"Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

Honorable Harold F. Reisch

Further, Sections 70.010, RSMo 1969 et seq., implement Section 14, and Sections 70.210, RSMo 1969 et seq., implement Section 16 above.

Although it appears at first glance that there is a conflict between Sections 14 and 16 of Article VI of the Missouri Constitution and the statutory provisions which implement such sections, it is our view that no such conflict exists. That is, Sections 70.010 to 70.090, which were enacted contemporaneously with Section 14, provide a procedure for petition (Section 70.020) and election (Sections 70.030 to 70.050) to adopt a proposition for the joint performance of common services by contiguous counties not exceeding ten in number. On the other hand, Sections 70.210 to 70.325, enacted in implementation of Section 16, include "counties" within the definition of "political subdivisions" (Section 70.210) and authorize the governing body of such counties, without limitation as to the number or location of such counties, to cooperate under contract in performing common services provided such cooperative action is within the scope of such counties' powers. (Section 70.220).

Keeping in mind that the Constitution is only a limitation on the power of the state legislature and not a grant of power, Hickey v. Board of Education of City of St. Louis, 256 S.W.2d 775 (Mo. 1953), it is our view that Section 16 and Sections 70.210 et seq., are applicable in the premises and that two or more counties whether contiguous or not and without regard to the number of such counties involved may enter into cooperative agreements.

We are enclosing a copy of our Opinion No. 167, dated July 10, 1969 to Branom, with respect to the power of a school district to contribute funds to a voluntary association, to compensate a person as acting director of such association out of district funds and to take part in support of or in opposition to legislation.

It is well recognized and a part of our fundamental law that the powers of the county courts are strictly limited to those powers expressly granted or fairly implied. Walker v. Linn County, 72 Mo. 650 (1880). In this instance the objectives that you have set out above are, generally speaking, proper county objectives. However as we noted, we do not attempt to pass upon all the questions that may be raised with respect to such agreements or upon the limits that may exist respecting the exercise of such powers.

In addition, Section 70.250 with respect to the method of financing provides:

"Any such municipality or political subdivision may provide for the financing of its share or

Honorable Harold F. Reisch

portion of the cost or expenses of such contract or cooperative action in a manner and by the same procedure for the financing by such municipality or political subdivision of the subject and purposes of said contract or cooperative action if acting alone and on its own behalf."

And, Section 70.260 respecting provisions which may be included in the joint contract states:

"The joint contract may also provide for the establishment and selection of a joint board, commission, officer or officers to supervise, manage and have charge of such joint planning, development, construction, acquisition, operation or service and provide for the powers and duties, terms of office, compensation, if any, and other provisions relating to the members of such joint board, commission, officers or officer. Such contract may include and specify terms and provisions relative to the termination or cancellation by ordinance, order or resolution, as the case may be, of such contract or cooperative action and the notice, if any, to be given of such cancellation, provided that such cancellation termination shall not relieve any party participating in such contract or cooperative action from any obligation or liability for its share of the cost or expense incurred prior to the effective date of any such cancellation."

Thus, counties may share in the financing of the expenses of such agreements and may also provide for the selection of officers to supervise and have charge of such joint planning, operation or service and to compensate such officers.

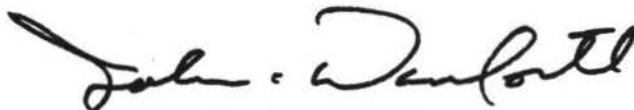
CONCLUSION

It is the opinion of this office that counties may cooperate with each other and expend county funds under the provisions of Section 70.210, RSMo 1969 et seq., within appropriate limitations, by becoming members of an association of counties for the purposes of research in the field of local government, providing training for county officials, providing information for the efficient operation of county government and supporting or opposing legislation affecting such counties.

Honorable Harold F. Reisch

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 167
7/10/69, Branom

GOVERNOR:
LEGISLATURE:
CONSTITUTIONAL LAW:

Senate Bill No. 488 of the Second
Regular Session of the 76th General
Assembly is unconstitutional be-

cause it authorizes the Senate and
House of Representatives to determine, by resolution, the number of
their officers and employees in excess of the limitations imposed
by Article III, Section 17 of the Missouri Constitution.

OPINION NO. 147

May 4, 1972

Honorable Warren E. Hearnes
Governor of Missouri
Executive Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Governor Hearnes:

You recently requested of this office an opinion concerning the constitutionality of Senate Bill No. 488 of the Second Session of the 76th General Assembly which permits the General Assembly of the State of Missouri to establish the number of its employees and officers by resolution. You specifically asked "... whether or not the constitutional authority to change the number of employees ... includes the right to further delegate that authority to ... [the legislature] ... by resolution rather than to [establish] a specific number of employees by the enactment of a law."

Senate Bill No. 488 repeals Section 21.150, RSMo 1969 and enacts a new section relating to the same subject. The primary change is made in subparagraph 1. The existing subparagraph 1 sets a fixed number of officers and employees for the Senate and House of Representatives. The following change is proposed by Senate Bill No. 488:

"The total number of officers and employees of the senate shall be determined by a resolution of the senate and the total number of officers and employees of the house of representatives shall be determined by resolution of the house."

The repealed subparagraph provided for a maximum number of officers and employees within the limits stated by Article III,

Honorable Warren E. Hearnes

Section 17 of the Missouri Constitution. The repeal of that subsection and the language of its substitute, permitting the General Assembly to determine by resolution the total number of its officers and employees, indicates a legislative intent to employ more personnel than authorized by Article III, Section 17 of the Missouri Constitution.

The constitutionality of the above-quoted provision is determined by two provisions of the Constitution of Missouri. Article III, Section 17 of the Missouri Constitution, adopted in 1970, states:

"Until otherwise provided by law, the house of representatives shall not employ more than one hundred twenty-five and the senate shall not employ more than seventy-five employees elective, appointive or any other at any time during any session." (Emphasis added)

Article III, Section 21 of the Missouri Constitution provides, in relevant part:

"The style of the laws of this state shall be 'Be it enacted by the General Assembly of the State of Missouri, as follows.' No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose. . . ." (Emphasis added)

The decision of Bohrer v. Toberman, 227 S.W.2d 719 (Mo.banc 1950) discussed, in a matter different from the one at hand, the relationship of resolutions to legislation. The decision observed that normally legislative action is equated to statutory enactment. It went on to uphold the use of the concurrent resolution as a device for achieving a temporary legislative purpose, such as the calling of a particular election and affixing the date thereof. However, the decision never equated a bill to a resolution as identical devices for achieving legislative goals. The court observed:

". . . The Constitution is not a grant, but a restriction upon the power of the Legislature, and hence an express enumeration of legislative powers and privileges in the Constitution cannot be considered as the exclusion of others not named unless accompanied by negative terms. . . ." (at 723) (Emphasis added)

The court further stated:

Honorable Warren E. Hearnnes

" . . . But it is clear that the forms in which some of the proceedings of the General Assembly may be expressed (except laws) are not limited to bills. . . ." (at 723)

In another decision it was stated that the legislature may supplement constitutional provisions only by the enactment of measures consistent with the limitations of the Constitution. State v. Blair, 270 S.W.2d 1 (Mo.banc 1954).

The constitutional provisions previously quoted, and the interpretation of the legislative process provided by the Bohrer decision compel the conclusion that Senate Bill No. 488, purporting to authorize the General Assembly to increase the total number of officers and employees beyond the constitutional limit by resolution, is unconstitutional. Article III, Section 17 of the Missouri Constitution requires any increase in the number of legislative officers and employees above the number specified by that provision to be provided for "by law." Section 21 of Article III specifically states that no law can be passed, except by bill.

A similar conclusion is stated in 81 C.J.S., States, Section 49 (1953):

"Except as restrained by constitutional limitations, the legislature may appoint or elect its own officers or employees, and such authority is sometimes expressly defined by statute. Where the constitution provides that the legislature shall prescribe by law the number, duties, and compensation of the officers and employees of each house, and requires that laws shall be passed by bill, statutes authorizing each house of the legislature to fix merely by resolution the number of subordinate officers and clerks of each house are invalid." (at 967) (citing Hall v. Blan, 148 So. 601 (Ala. 1933)).

CONCLUSION

It is the opinion of this office that Senate Bill No. 488 of the Second Regular Session of the 76th General Assembly is unconstitutional because it authorizes the Senate and House of Representatives to determine, by resolution, the number of their officers and employees in excess of the limitations imposed by Article III, Section 17 of the Missouri Constitution.

Honorable Warren E. Hearnes

The foregoing opinion, which I hereby approve, was prepared by my assistant, Peter H. Ruger.

Very truly yours,

A handwritten signature in dark ink, reading "John C. Danforth". The signature is written in a cursive style with a large, sweeping initial "J" and a long, horizontal flourish extending to the right.

JOHN C. DANFORTH
Attorney General

TAXATION (CITIES, TOWNS & VILLAGES)
POLITICAL SUBDIVISIONS
EARNINGS TAX

School districts in St. Louis County, under the provisions of Section 92.350, RSMo 1969, must deduct the St. Louis

City Earnings Tax from the wages and salaries of their employees who are residents of the City of St. Louis, and remit the amount withheld (less statutory allowances) to the St. Louis City Collector.

OPINION NO. 148

August 22, 1972



Dr. Arthur L. Mallory
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This official opinion is issued in response to your request for a ruling on whether local districts are required under Section 92.350, RSMo 1969, to deduct the amount of any municipal earnings tax levied against the earnings of teachers and other employees who reside in a municipality where an earnings tax is levied if the municipality is not within the boundaries of the employing school district.

Your request is prompted by a recent demand of the St. Louis City Collector that some of the school districts in St. Louis County withhold an amount equal to the St. Louis City Earnings Tax and remit the sum to the City Collector. We confine our opinion to a determination of whether school districts in St. Louis County must deduct the St. Louis City Earnings Tax from the paychecks of their employees who are residents of the City of St. Louis, and remit the amount withheld to the St. Louis City Collector.

Under Section 92.110, RSMo 1969, and its predecessor, the City of St. Louis has been authorized to levy and collect, by ordinance, for general revenue purposes, an earnings tax on the salaries, wages, and other compensation earned by its residents:

"Tax may be levied on earnings and profits (St. Louis). Any constitutional charter city in this state which now has or may hereafter acquire a population in

Dr. Arthur L. Mallory

excess of seven hundred thousand inhabitants, according to the last federal decennial census, is hereby authorized to levy and collect, by ordinance, for general revenue purposes, an earnings tax on the salaries, wages, commissions and other compensation earned by its residents; on the salaries, wages, commissions and other compensation earned by nonresidents of the city for work done or services performed or rendered in the city; on the net profits of associations, business or other activities conducted by residents; on the net profits of associations, businesses or other activities conducted in the city by nonresidents; and on the net profits earned by all corporations as the result of work done or services performed or rendered and business or other activities conducted in the city." (Emphasis added.)

From the federal decennial census of 1920 through the census of 1960, the City of St. Louis had a population of more than 700,000 inhabitants. Thus, Section 92.110 (and its predecessor) applied to St. Louis. According to the federal census in 1970, however, the population of the City of St. Louis has fallen below 700,000 (to 622,236). (See Official Manual, State of Missouri, 1971-1972, page 1424.) Section 92.110, RSMo 1969, remains in force, nevertheless, by virtue of Section 1.100.2., RSMo 1971 Supp.:

"Population, how determined -- effective date of census -- loss or gain in population for certain purposes, effect of.

*

*

*

"2. Any law which is limited in its operation to counties, cities or other political subdivisions having a specified population or a specified assessed valuation shall be deemed to include all counties, cities or political subdivisions which thereafter acquire such population or assessed valuation as well as those in that category at the time the

Dr. Arthur L. Mallory

law passed. Once a city not located in a county has come under the operation of such a law a subsequent loss of population shall not remove that city from the operation of that law. . . ." (Emphasis added.)

In 1960, St. Louis passed an ordinance providing for the levying and collecting of an earnings tax effective in St. Louis (St. Louis, Missouri, Revised Code of Ordinances, Chapter 145, Earnings Tax, 1960).

Sections 92.120 through 92.200, RSMo 1969, describe various requirements for the earnings tax, including the tax rate limit; certain exceptions to the earnings tax; and arrangements for employers to collect and remit the tax while retaining a percentage as compensation.

In the instant situation, the City of St. Louis seeks to collect its earnings tax from city residents employed by school districts in St. Louis County, by having these school districts deduct the tax from their wages and salaries. Section 92.350, RSMo 1969, requires the state and its political subdivisions to make such deductions:

"State and political subdivisions to deduct earnings tax -- compensation for collecting. -- The state of Missouri and all its political subdivisions or instrumentalities shall deduct from the wages and salaries of their employees the amount of any municipal earnings tax levied upon the income of the particular employee, and pay same to the municipality levying said tax. The state of Missouri and its political subdivisions and instrumentalities shall be entitled to deduct and retain of the total amount so collected to compensate such employer for collecting the tax a percentage as follows: Three percent if said municipal earnings tax is one-half of one percent of gross earnings. One and one-half percent if said municipal earnings tax is one percent of gross earnings." (Emphasis added.)

Dr. Arthur L. Mallory

In Smith v. Consolidated School District No. 2, 408 S.W.2d 50 (Mo. en banc, 1966) the Court held that school districts, as political subdivisions of the state, are immune from liability in tort for negligence.

" . . . For more than a century the courts of Missouri have uniformly held generally that political subdivisions of the state are not subject to liability in suits for negligence. [Citations omitted.] School districts are political subdivisions of the state. Art. 10, Section 15, Constitution of Missouri, V.A.M.S., Section 70.210, RSMo 1959, V.A.M.S. As such, school districts have long been held immune from liability in tort for negligence. . . ." Id. at 54. (Emphasis added.)

School districts have been included in various definitions of "political subdivision." In Section 15, Article X (Taxation), Missouri Constitution, the term "other political subdivision" is defined as follows:

"Definition of 'other political subdivision.' The term 'other political subdivision,' as used in this article [on taxation], shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax." (Emphasis added.)

"Political subdivision" is defined in Section 70.210(2), RSMo 1969, as follows:

"Definitions. -- As used in sections 70.210 to 70.320[on cooperation by political subdivisions under contract], the following terms mean:

* * *

"(2) 'Political subdivision,' counties, townships, cities, towns, villages, school, county library, city library, city-county

Dr. Arthur L. Mallory

library, road, drainage, sewer, levee and fire districts, soil and water conservation districts, watershed subdistricts, and any board of control of an art museum." (Emphasis added.)

See, also, Opinion No. 425, Norris, December 14, 1971, in which we concluded that school districts are political subdivisions of the State of Missouri, and so fall under the provisions of Sections 67.330 through 67.390, RSMo 1969, relating to services that promote the economy and efficiency of operations of local government; Opinion No. 312, Crow, November 4, 1970, in which we concluded that school districts are subdivisions of the State and, therefore, the functions they perform are "governmental" functions.

We find no basis for excluding school districts from the coverage of Section 92.350, RSMo 1969. Furthermore, we find no language in Section 92.350 which would indicate that the legislature intended that only political subdivisions of the State within the city's boundaries are subject to its terms.

CONCLUSION

Therefore, it is the conclusion of this office that school districts in St. Louis County, under the provisions of Section 92.350, RSMo 1969, must deduct the St. Louis City Earnings Tax from the wages and salaries of their employees who are residents of the City of St. Louis, and remit the amount withheld (less statutory allowances) to the St. Louis City Collector.

The foregoing opinion, which I hereby approve, was prepared by my Assistant D. Brook Bartlett.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosures:

Opinion No. 312, Crow, November 4, 1970
Opinion No. 425, Norris, December 14, 1971

AMBULANCES: Fire trucks and ambulances, whether
MOTOR VEHICLES: publicly owned or privately owned,
FIRE DEPARTMENT: operated by a member of an organized
EMERGENCY VEHICLES: fire department or ambulance asso-
MOTOR VEHICLE EQUIPMENT: ciation, may display lighted red
lights, or, with a permit from the
chief of the organized fire department or ambulance association,
may display a flashing blue light when responding to an emergency
call, and the operators of such vehicles may park irrespective of
the provisions of Sections 304.014 to 304.026, RSMo 1969, with cau-
tion, disregard stop signals, speed limits, and regulations requir-
ing parking and turning of vehicles in specified directions, but
comply with all other traffic laws and regulations, and the opera-
tor of all other vehicles on a street or highway, shall yield the
right-of-way when such vehicle approaches.

OPINION NO. 152

June 20, 1972

Honorable John A. Grellner
Representative, District 40
7523 Weil
Shrewsbury, Missouri 63119



Dear Representative Grellner:

This is in response to your request for an opinion as follows:

"What color emergency lights are to be used
by publicly owned fire equipment and ambu-
lances?"

"Robert E. Watts, in his capacity as Fire
Chief of Brentwood and President of the
Greater St. Louis County Fire Chiefs Associa-
tion consisting of 47 Fire Departments, are
confused by Sections 304.022 and 307.175 as
to whether red or blue lights should be used
on fire trucks and ambulances."

Laws governing motor vehicles and their equipment is purely
statutory.

Section 307.095, RSMo 1969, provides as follows:

"Headlamps, when lighted, shall exhibit lights
substantially white in color; auxiliary lamps,
cowllamps and spot lamps, when lighted, shall

Honorable John A. Grellner

exhibit lights substantially white, yellow or amber in color. No person shall drive or move any vehicle or equipment, except a school bus when used for school purposes or an emergency vehicle upon any street or highway with any lamp or device thereon displaying a red light visible from directly in front thereof."

This section prohibits any person from driving any vehicle, except a school bus or an emergency vehicle, on any street or highway displaying a red light visible directly in front thereof.

We are unable to find any statute requiring an ambulance or fire truck to display a red or blue light.

In order to answer your question, two statutes enacted at the same time in one bill must be interpreted. The cardinal rule of statutory construction is to ascertain the intention of the lawmaking body and as far as possible to give effect to the intention of the legislature. If it is susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute. *Household Finance Corporation v. Robertson*, 364 S.W.2d 595 (Mo. banc 1963). Statutes in pari materia should be construed together and harmonized insofar as reasonably possible. *State v. Bern*, 322 S.W.2d 175 (Spr.Ct.App. 1959). The rule of construing statutes in pari materia is especially applicable where two statutes are enacted at the session of the General Assembly. *State v. Chadeayne*, 313 S.W.2d 757 (St.L.Ct.App. 1958) transferred to 323 S.W.2d 680 (Mo. banc 1959).

Sections 304.022 and 307.175, RSMo 1969, were repealed and reenacted by House Bill No. 113 of the 76th General Assembly in 1971. These statutes are in pari materia and should be construed together in arriving at the intention of the legislature.

Section 304.022, RSMo, as reenacted, reads as follows:

"1. Upon the immediate approach of an emergency vehicle giving audible signal by siren or while having at least one lighted lamp exhibiting red light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle or a flashing blue light authorized by section 307.175, RSMo, the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to,

Honorable John A. Grellner

and as far as possible to the right of, the traveled portion of the highway and thereupon stop and remain in such position until such emergency vehicle has passed, except when otherwise directed by a police or traffic officer.

"2. The motorman of every streetcar shall immediately stop such car clear of any intersection and keep it in such position until the emergency vehicle has passed, except as otherwise directed by a police or traffic officer.

"3. An 'emergency vehicle' is a vehicle of any of the following types:

(1) a vehicle operated as an ambulance, or a vehicle operated by the state highway patrol, police or fire department, sheriff, constable or deputy sheriff, traffic officer or coroner;

(2) Any vehicle qualifying as an emergency vehicle under section 307.175, RSMo;

(3) Any wrecker, or tow truck or a vehicle owned and operated by a public utility or public service corporation while performing emergency service.

"4. (1) The driver of any vehicle referred to in subdivisions (1), (2), (3) of subsection 3 of this section shall not sound the siren thereon or have the front red lights or blue lights on except when said vehicle is responding to an emergency call or when in pursuit of an actual or suspected law violator, or when responding to, but not upon returning from, a fire.

(2) The driver of an emergency vehicle may:

(a) Park or stand irrespective of the provisions of sections 304.014 to 304.026;

(b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

(c) Exceed the prima facie speed limit so long as he does not endanger life or property;

Honorable John A. Grellner

(d) Disregard regulations governing direction of movement or turning in specified directions;

(3) The exemptions herein granted to an emergency vehicle shall apply only when the driver of any such vehicle while in motion sounds audible signal by bell, siren, or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp displaying a red light or blue light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle."

This section defines the duties and responsibilities of persons operating such vehicles when traveling on the highways. It requires the driver of every other vehicle on the highway when an emergency vehicle approaches, sounding a siren or having lighted red light or flashing blue light to yield the right-of-way in the manner as provided therein. An ambulance or vehicle operated by the fire department is classified as an emergency vehicle. The provisions of this statute prior to its repeal applied only to publicly owned vehicles. As amended and reenacted it applies to both publicly owned and privately owned vehicles. It requires the drivers of all other vehicles on the highway to yield the right-of-way to such emergency vehicles when they approach with either a lighted red light or a flashing blue light displayed. It further provides that a driver of an emergency vehicle may park irrespective of the provisions of Sections 304.014 to 304.026, proceed past a red or stop signal or stop sign, only after slowing down as may be necessary for safe operation; exceed the prima facie speed limit so long as it does not endanger life or property and disregard regulations governing direction of movement or turning in specified directions, when such vehicle is responding to an emergency call and sounding a siren or exhaust whistle and displaying a lighted red light or a flashing blue light.

It is our opinion that under this statute an ambulance or a vehicle operated by a fire department, whether publicly owned or privately owned, may have a lighted red light or flashing blue light while traveling on a highway when such vehicle is responding to an emergency call and be exempt from the traffic laws and regulations as heretofore stated.

Section 307.175, RSMo Supp. 1971, provides as follows:

"Motor vehicles and equipment which are operated by any member of an organized fire department or ambulance association, whether

Honorable John A. Grellner

paid or volunteer, may be operated on streets and highways in this state as an emergency vehicle under the provisions of 304.022, RSMo, while responding to a fire call or ambulance call or at the scene of a fire call or ambulance call and while using or sounding a warning siren and while using or displaying thereon fixed, flashing or rotating blue lights, but sirens and blue lights shall be used only in bona fide emergencies. Permits for the operation of such vehicles equipped with sirens or blue lights shall be in writing and shall be issued and may be revoked by the chief of an organized fire department or organized ambulance association and no person shall use or display a siren or blue lights on a motor vehicle and fire or ambulance equipment without a valid permit authorizing the use. Permit to use a siren or lights as heretofore set out does not relieve the operator of the vehicle so equipped with complying with all other traffic laws and regulations. Violation of this section constitutes a misdemeanor." (Emphasis supplied)

This section applies to members of an organized fire department or ambulance association operating motor vehicles or ambulances, whether the members are paid or volunteers, and whether the motor vehicle or equipment which they are operating is publicly or privately owned. It is not limited to fire trucks or ambulances but applies to any motor vehicle operated by members of an organized fire department or ambulance association. It does not apply to other emergency vehicles described in Section 304.022. It provides that such motor vehicles and equipment may be operated as emergency vehicles under Section 304.022 while responding to a fire call or ambulance call and while sounding a warning siren and while using or displaying flashing or rotating blue lights but sirens and blue lights are permitted only when used during bona fide emergencies.

As heretofore stated, there is no express provision by statute requiring fire trucks or ambulances to be equipped with red or blue lights other than red lights required on all motor vehicles. The statutes do grant certain privileges to persons operating such vehicles on streets or highways during an emergency when equipped with red or blue lights and require all other vehicles to yield the right-of-way when such vehicles approach during an emergency.

It is our opinion that under the provisions of the above statutes any motor vehicle, operated by members of an organized fire

Honorable John A. Grellner

department or ambulance association whether paid or volunteer, including fire trucks and ambulances, whether publicly owned or privately owned, may be operated on the streets or highways while displaying a red light or with permission from the chief of the fire department or ambulance association, may display a flashing blue light, when responding to an emergency call, and the operators of such vehicles may park irrespective of the provisions of Sections 304.014 to 304.026, disregard stop signals, speed limits, and regulations governing the parking or turning of such vehicles in specific directions, but must obey all other traffic laws and regulations, and the operators of all other vehicles on such street or highway shall yield the right-of-way when such vehicle approaches.

CONCLUSION

It is the opinion of this office that fire trucks and ambulances, whether publicly owned or privately owned, operated by a member of an organized fire department or ambulance association, may display lighted red lights, or, with a permit from the chief of the organized fire department or ambulance association, may display a flashing blue light when responding to an emergency call, and the operators of such vehicles may park irrespective of the provisions of Sections 304.014 to 304.026, RSMo 1969, with caution, disregard stop signals, speed limits, and regulations requiring parking and turning of vehicles in specified directions, but comply with all other traffic laws and regulations, and the operator of all other vehicles on a street or highway, shall yield the right-of-way when such vehicle approaches.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

June 13, 1972

OPINION LETTER NO. 154

Honorable George W. Parker
Representative, District 120
819 Crestland Avenue
Columbia, Missouri 65201

Dear Representative Parker:

This letter is in response to your request for an opinion on the following submitted question:

"Does [sic] the provisions of 146.052, RSMo., Sup 1971, which provides that the director of revenue shall maintain the intangible tax funds in banking institutions selected by him, constitute an unconstitutional delegation of power?"

Article IV, Section 15, Missouri Constitution, 1945, provides, in pertinent part:

"The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, . . ."

Likewise, Article III, Section 36, Missouri Constitution, 1945, provides, in pertinent part:

"All revenue collected and money received by the state shall go into the treasury . . ."

Honorable George W. Parker

The initial question to be answered is what moneys are required to go "into the state treasury." Each of the above constitutional sections has as its source Article IV, Section 43 of the Constitution of 1875 which stated, in pertinent part:

"All revenue collected and money received by the state from any source whatsoever, shall go into the treasury. . . ."

The above proviso was construed in the 1924 case of State ex rel. Thompson v. Board of Regents for Northeast Missouri State Teachers' College, 264 S.W. 698 (Mo. en banc 1924) not to apply to money paid the defendant Board of Regents on account of fire insurance losses since the premiums for such insurance had been paid from tuition fees. Of significance in the court's opinion was its interpretation of the phraseology "revenue collected and money received by the state from any source whatsoever" to mean the "current income of the state from whatsoever source derived which is subject to appropriation for public uses." (Id. at 700). The court's interpretation of the constitutional mandate emphasizes the fact that revenue or moneys received, which are to be paid into the state treasury, are only those moneys received pursuant to legislative fiat that are considered part of the state's current income. See also, State ex rel. Fath v. Henderson, 60 S.W. 1093 (Mo. 1901).

Article X, Section 4(c), Missouri Constitution, 1945, provides, in pertinent part, that the proceeds of the tax on intangible personal property are to be:

". . . assessed, levied and collected by the state and returned as provided by law, less two percent for collection, to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy."

Are moneys collected pursuant to the Missouri Intangible Personal Property Tax Law [Chapter 146, RSMo 1969] moneys within the meaning of the constitutional provisions, Article IV, Section 15 and Article III, Section 36, supra? A previous opinion of this office, No. 223, 10-27-69, Owens, copy enclosed, answered the question in the negative.

It is the opinion of this office that Section 146.052, RSMo Supp. 1971, does not fall within the constitutional provisions of either Article IV, Section 15 or Article III, Section 36, Missouri Constitution, 1945, requiring "revenue" and "money" received by

Honorable George W. Parker

the state to be deposited in the state treasury. The authority given the director of revenue pursuant to Section 146.052, RSMo Supp. 1971, therefore, does not entail an unconstitutional delegation of power.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 223
10-27-69, Owens

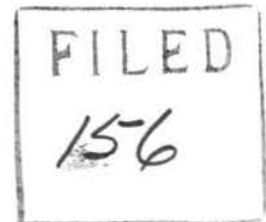
BANKS:

For the purposes of Section 362.107.2(4), RSMo Supp. 1971, which establishes a minimum distance between a drive-in facility of a bank and a main banking house of another banking institution, the distance between the bank facility and the competing main banking house should be measured along the shortest and straight line from the building of the main banking house devoted to banking activity to the building of the facility devoted to the banking activities permitted to be conducted at a facility.

OPINION NO. 156

June 30, 1972

Mr. H. Duane Pemberton
Commissioner of Finance
Division of Finance
Post Office Box 716
Jefferson City, Missouri 65101



Dear Mr. Pemberton:

This is in response to your request for an opinion on the following question:

"Section 362.107 . . . sets the limitation of 400 feet between a bank's facility and the competing bank. The question is does the measurement of 400 feet go from property lines to the closest point of property line of the competing bank, or does it mean building to building?"

Section 362.107.2(4),* RSMo Supp. 1971, provides:

"No such bank or trust company may maintain or operate:

* * *

(4) Such facility located closer than four hundred feet to the main banking house of another then existing banking institution . . ."

*House Bill No. 1062, Second Regular Session, 76th General Assembly, which has been passed by the General Assembly and signed by the Governor is scheduled to take effect August 13, 1972. While that will change some language of Section 362.107, RSMo Supp. 1971, it does not affect this opinion.

Mr. H. Duane Pemberton

We have found no cases from Missouri or other jurisdictions directly in point with respect to measuring distance between banking locations. This office has held that the measurement of distance with respect to the banking laws is by a straight line. Opinion No. 394, Pemberton, August 19, 1971.

From the use of the words "banking house" in Section 362.107.2 (4), we are of the opinion that the starting point for measurement of the four hundred feet limit as set out in that section should be the portion of the building used as the main banking house of the existing bank, and not the property line of the real estate on which the banking house is located. For reasons which will be discussed, we are of the opinion that the measurement line should terminate at the portion of the building used to house the facility, and not the property line of the real estate on which such building is located.

Commonly a facility will offer parking space to customers utilizing the facility. While it could be argued that such parking space is an integral part of the facility and should be included in measuring the distance between the facility and a competing main banking house, we believe that by the use of the word facility in Section 362.107 the legislature had reference only to the actual premises at which certain banking transactions are expressly permitted by Section 362.107 to be performed and not to surrounding parking lots or other real property and premises. Supporting this conclusion is a New York case, Long Island National Bank v. Superintendent of Banks, 290 N.Y.S.2d 820, 823 (1967). There it was contended, by the bank objecting to the approval of a competing bank's branch bank application by the New York superintendent of banks, that the branch was in Hicksville rather than Jericho, as the superintendent had found, because the bank's parking lot was in Hicksville. The court rejected the contention that the location of the parking lot was controlling; holding:

"Nor does the fact that the parking area for the proposed branch bank building is located south of the line of demarcation between Jericho and Hicksville, and, therefore, in Hicksville, require a holding that the branch office itself is located in Hicksville. A place of business is to be differentiated from the parking area provided for its patrons and may be, as it often is, some distance away from the parking area, with property owned by others in between."

We believe the same reasoning is applicable to the present opinion. The fact that land or property surrounding the facility

Mr. H. Duane Pemberton

is devoted to uses such as parking areas for bank customers, other than the banking transactions performed at the facility dictates such land or property, either surrounding the facility or apart from the facility, should not be considered a part of the facility in measuring distance between the facility and the main banking house of a competing bank. This approach is consistent with the opinions this office has issued concerning measurement of distance between a school or church and an establishment selling liquor-by-the-drink. See, Opinion No. 10, Bowers, January 17, 1938, and Opinion No. 22, Dempster, September 22, 1953.

CONCLUSION

It is the opinion of this office that for the purposes of Section 362.107.2(4), RSMo Supp. 1971, which establishes a minimum distance between a drive-in facility of a bank and a main banking house of another banking institution, the distance between the bank facility and the competing main banking house should be measured along the shortest and straight line from the building of the main banking house devoted to the banking activity to the building of the facility devoted to the banking activities permitted to be conducted at a facility.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 394
8-19-71, Pemberton

Op. No. 10
1-17-38, Bowers

Op. No. 22
9-22-53, Dempster



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

June 19, 1972

OPINION LETTER NO. 157

Dr. Arthur L. Mallory
Commissioner of Education
State Board of Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the State Board of Education's State Plan for fiscal year 1973, under Title III of the Elementary and Secondary Education Act of 1965.

Our review has taken into consideration Title III of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended; the Federal Regulations (45 C.F.R. 118, January 1, 1972 edition); Article III, Section 38(a) and Article IX, Section 2(a), Missouri Constitution; Sections 162.092 and 178.430, RSMo 1969, and related provisions.

It is the opinion of this office that:

1. The Missouri State Board of Education is the "State Educational Agency" required by Section 305(a)(1)(c), Public Law 89-10, Title III, as amended, to have authority to act as the sole agency to submit the State Plan;
2. The Missouri State Board of Education has authority under State law to carry out or arrange for the carrying out of the programs described in the State Plan;
3. All State Plan provisions with respect to the use of funds under Title III can be carried out in the State.

Dr. Arthur L. Mallory

4. The Missouri State Board of Education has authority to provide for the participation on an equitable basis of all children enrolled in non-profit private schools in programs under the State Plan;
5. All provisions of the State Plan are consistent with State law with the exception of the provision of paragraph 16 of the Assurances and paragraph 3 of Section 2.3.15 of the Plan.

In conjunction with this Letter Opinion which constitutes our official certification of the State Plan, we have completed a certification form consistent with this Opinion Letter.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

May 31, 1972

OPINION LETTER NO. 158

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the State Board of Education's State Plan for fiscal year 1973, under Title VI, Elementary and Secondary Education Act of 1965, Public Law 91-230, 20 U.S.C. Section 1401 et seq.

Our review has taken into consideration the Education of the Handicapped Act, Public Law 91-230, 20 U.S.C. Section 1401, et seq.; Federal Regulations (45 C.F.R. 121, January 1, 1972 Edition); Article III, Section 38(a) and Article IX, Section 2 (a), Missouri Constitution; Section 161.092, RSMo 1969, and related provisions.

It is the opinion of this office that:

(1) The Missouri State Board of Education is the "State educational agency" defined in 20 U.S.C. Section 1401(7);

(2) the Missouri State Board of Education has authority under State law to submit the State Plan pursuant to the Education of the Handicapped Act and to administer and supervise the administration of the Plan;

(3) the Missouri State Board of Education has authority under State law to carry out, directly or through local educational agencies, the activities described in the Plan;

(4) all Plan provisions are consistent with State law; and

Dr. Arthur L. Mallory

(5) the Commissioner of Education has been duly authorized by the Missouri State Board of Education to submit a State Plan pursuant to the Education of the Handicapped Act and to represent the Missouri State Board of Education in all matters pertaining to that Plan.

In conjunction with this letter opinion, which constitutes our official certification of the State Plan, we have completed a certification form consistent with this Opinion Letter.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a prominent "D".

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

May 25, 1972

OPINION LETTER NO. 159

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This is in response to your request for an official ballot title for the proposed constitutional amendment of House Joint Resolution No. 65, Second Regular Session of the 76th General Assembly.

Pursuant to Section 125.030, RSMo 1969, the official ballot title is as follows:

Provides for the organization of the executive branch of the state into not more than 14 departments, an office of administration, and the 6 presently existing state elective offices. All state boards, bureaus, commissions and agencies are to be assigned to one of the departments or office of administration. Provides for Senate confirmation of all executive officials appointed by the Governor.

Yours very truly,

A handwritten signature in dark ink, reading "John C. Danforth", is written over the typed name.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

May 18, 1972

OPINION LETTER NO. 160

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This is in response to your request for an official ballot title for the proposed constitutional amendment under House Joint Resolution No. 61, 76th General Assembly, Second Regular Session.

The Attorney General has drafted said ballot title pursuant to Section 125.030, RSMo 1969, as follows:

Authorizes the General Assembly to consider bills returned by the Governor five days or less before last day bills can be considered in odd-numbered years by placing the bill at the top of the calendar for consideration at next regular session and if bills are so returned, in even-numbered years by reconvening for a period not to exceed ten days.

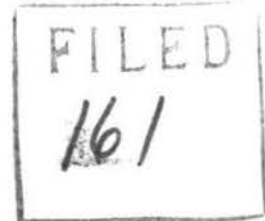
Yours very truly

JOHN C. DANFORTH
Attorney General

May 24, 1972

OPINION LETTER NO. 161
Answer by Letter - Klaffenbach

Honorable A. Basey Vanlandingham
Missouri Senate, District 19
Post Office Box 711
Columbia, Missouri 65201



Dear Senator Vanlandingham:

This opinion is in response to your question in which you ask whether the city attorney of a third class city must represent the board of public works or whether such a board may employ private counsel.

The statute with respect to the duties of a city attorney in third class cities is Section 98.330, RSMo 1969, which provides:

"It shall be the duty of the city attorney to prosecute and defend all actions originating or pending in any court in this state to which the city is a party, or in which the interests of the city are involved, and shall, generally, perform all legal services required in behalf of the city. In any complaint made before the police judge, the city attorney may, if in his judgment the interest of the city demands it, require the complainant, or party at whose instance the complaint is made, to give security for costs, to be approved by the police judge, before proceeding further with such cause."

Section 98.340, RSMo 1969, also provides:

"In any suit or action at law or in equity brought by or against the city except in prosecutions begun before the police judge, the

Honorable A. Basey Vanlandingham

city council may, by resolution, employ an attorney or attorneys, and pay him or them a reasonable fee therefor; provided, that any city may, by ordinance, provide for the office of city counselor and his duties and compensation. Such city counselor, when so provided for, shall represent the city in all cases in all courts of record in this state; shall draft all ordinances and contracts and all legal forms of every kind, and give legal advice to the council and other officers of the city, and perform such other duties as shall be prescribed by ordinance or shall be ordered by the council or the mayor. In any city where there is a city counselor, the duties of the city attorney shall be such as may be prescribed by ordinance." (Emphasis added)

We find no authority for the board of public works to employ private counsel. Section 91.500, RSMo 1969 authorizes the board to appoint a chief superintendent and other subordinates, however, in our view such section does not authorize the employment of private counsel.

By comparison we refer you to our enclosed opinion, No. 131, dated June 26, 1964 to Hollingsworth, in which we held that a county planning commission does not have the authority to employ legal counsel and that the prosecuting attorney must act for such planning commission. We believe that the reasoning in that opinion is applicable in this instance also, and therefore, conclude that the board of public works has no authority to employ private counsel.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 131
6/26/64, Hollingsworth

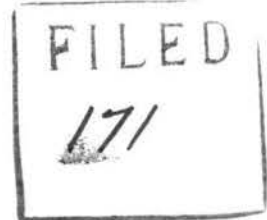
TAXATION (INTANGIBLE):
CONSTITUTIONAL LAW:

House Bill No. 537 does not violate the provisions of Article X of the Missouri Constitution and is therefore not unconstitutional.

OPINION NO. 171

June 23, 1972

Honorable Warren E. Hearnes
Governor of Missouri
Executive Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Governor Hearnes:

You recently asked this office to answer the question of whether House Bill No. 537, recently passed by the Second Regular Session of the 76th General Assembly, is violative of Article X of the Missouri Constitution.

I. CHANGES MADE BY HOUSE BILL NO. 537

House Bill No. 537 makes two changes in the intangible tax law of Missouri, Chapter 146, RSMo 1969:

A. The most significant change is that the Act repeals certain sections of Chapter 146. The operative provisions, imposing an intangible tax, are repealed effective January 1, 1975.

B. The second change provides a new definition of "yield." The change proposed by House Bill No. 537 is designed to overrule Opinion No. 53-1972 of this office that determined that an account receivable held by a parent corporation evidencing an obligation of a subsidiary corporation is intangible personal property. The opinion further held that proceeds received by the parent corporation constitute "yield", therefore such a parent corporation holding the legal or equitable title or beneficial interest in intangible personal property is subject to the tax imposed by Chapter 146, RSMo.

As a result of the amendment, Section 146.010, RSMo would state, in relevant part:

"The terms 'yield' or 'annual yield' means the aggregate proceeds received as a result of ownership or beneficial interest in intangible property whether received in money, credits or property, exclusive of any return of capital, and less the amount of interest required to be credited by the owner thereof, during the preceding calendar year, to reserve liabilities of the owner maintained under the statutes of this state, and less proceeds set aside or accumulated by the owner thereof under contracts or agreements for pension or retirement or employee benefits, and less the amount of interest or other proceeds from the use of intangibles received by any corporation on any loan by it to another corporation, at least eighty percent of whose voting stock was owned by the lending corporation, and less the amount of interest or proceeds from the use of intangibles received by any corporation from an affiliate corporation, each of whose stock was at least eighty percent owned by another corporation, or one hundred percent owned by ten or fewer individuals."

(Emphasis added)

This addition has the effect of eliminating the imposition of intangible tax prior to January 1, 1975 on interest received by a parent corporation from certain subsidiary and affiliated corporations.

II. POSSIBLE CONSTITUTIONAL OBJECTIONS

It could be suggested that enactment of House Bill No. 537 might violate Sections 2, 3, 4 and 6 of Article X of the Missouri Constitution. The repeal is arguably affected by Sections 2 and 3 whereas the new definition of yield is to be measured against the standards of Sections 3, 4 and 6. Section 2 of Article X deals with the inalienability of power to tax; Section 3 establishes the principle of uniformity of taxation; Section 4 provides for classification of property and the assessment of such property; and Section 6 restricts the power of the legislature to grant exemptions of property from taxation.

A. Constitutionality of the Repeal.

1. Application of Section 2. Section 2 of Article X of the Missouri Constitution states:

Honorable Warren E. Hearnes

"The power to tax shall not be surrendered, suspended or contracted away, except as authorized by this Constitution."

The repeal of the intangible tax act, Chapter 146 of the Missouri Statutes, does not constitute a violation of this provision. By the repeal, the legislature is not diminishing the power to tax but merely determining that the power to tax intangibles, as granted by the Constitution, shall not be exercised in its present form after January 1, 1975. It is entirely possible that, after a review of the matter, the legislature could enact a new intangible tax law or reenact Chapter 146. Because the repeal would not surrender the legislative power to tax but would only suspend imposition of the intangible tax, Section 2 of Article X is not violated.

2. Application of Section 3. Section 3 of Article X states, in relevant part:

"Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. . . ."

It has been observed that the General Assembly is vested with wide discretion to make classifications for taxation purposes without violating Article X, Section 3. Taxation measures are not constitutionally infirm because certain inequalities may result, so long as the classification is not "palpably arbitrary" and without reason or necessity. State ex rel. Transport Manufacturing and Equipment Company v. Bates, 224 S.W.2d 996 (Mo. 1949); State ex rel. Jones v. Nolte, 165 S.W.2d 632 (Mo. Banc 1942); Northwestern Masonic Aid Association v. Waddil, 40 S.W. 648 (Mo. Banc 1897). A tax is "uniform" when it operates with the same force and effect in every place where the subject of it is found. "Uniformity" does not mean that the same rate must be levied upon all subjects, but, when subjects are once classified, the rate must be uniform upon all subjects of the same class. City of Cape Girardeau v. Fred A. Groves Motor Company, 142 S.W.2d 1040 (Mo. 1940). In Ex parte Asotsky, 5 S.W.2d 22 (Mo. Banc 1928) the court observed that classification for taxing purposes is primarily a legislative question, and a particular scheme of classification will be upheld if justifiable upon any reasonable theory. In view of the broad legislative powers recognized in the above cited cases, we do not believe that the Act violates Section 3 of Article X.

It has been suggested that repeal of Chapter 146, RSMo would cause Chapter 148, RSMo, providing for taxation of financial institutions, to be unconstitutional because this would result in

Honorable Warren E. Hearnese

a classification of intangible property or an exemption from property taxation contrary to the Constitution.

It is clear that Chapters 146 and 148 are based on different classifications of property and types of taxation, thus the repeal of Chapter 146 and the continued existence of Chapter 148 does not compel a conclusion that the "uniformity" section is violated. Prior opinions of this office have discussed the portions of Chapter 148 dealing with banks and credit institutions and have held that the taxes imposed are in the nature of privilege taxes rather than intangible taxes. See Opinions No. 241-1971; No. 105-1967. A significant decision, General American Life Insurance Company v. Bates, 249 S.W.2d 458 (Mo. 1952) observed, at 464, that the provisions of Chapter 148 dealing with insurance companies establish an excise or occupational tax imposed upon the privilege of conducting certain authorized businesses, and not a tax on intangible personal property. It would follow then that the use of the term intangible personal property, in Chapter 148, is a nullity and not a determinative of the issue of the type of tax imposed by that chapter. Thus, in light of the preceding authorities, the tax imposed by Chapter 148 with respect to savings and loan associations also constitute privilege taxes. At this juncture, it is impossible for this office to say that such a classification, on its face, is palpably arbitrary and unreasonable.

B. Constitutionality of the New Yield Definition.

As previously noted, the constitutionality of the new definition of yield is to be determined by the application of Sections 3, 4 and 6 of Article X. The effect of Section 3 is determined by considerations previously stated with respect to the uniformity issue presented by Section 3 and such holding is equally applicable to the resolution of this question (see supra, Section A, 2). This section is not contravened by the new yield definition.

1. Application of Section 4. Section 4(a) of Article X states:

"All taxable property shall be classified for tax purposes as follows: Class 1, real property; Class 2, tangible personal property; Class 3, intangible personal property. The general assembly, by general law, may provide for further classification within Classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned. Nothing

in this section shall prevent the taxing of franchises, privileges or incomes, or the levying of excise or motor vehicle license taxes, or any other taxes of the same or different types."

A reading of the relevant portions of the debates on the Constitution of 1945 indicate that it was deemed wise and desirable to permit classification and subclassification of intangible personal property. Debates, pp. 6287, 6298. The view was also expressed that the General Assembly should have wide latitude in the process of subclassification. Debates, p. 6299. The debates reveal a discussion of particular types of intangible property that could constitute subclasses of intangibles. A differentiation was made between bonds, stocks and other intangible property. The view was expressed that certain types of intangibles have a difference in terms of economic value and productivity and that the tax system should recognize this. Debates, p. 6304. The adoption of a "yield" theory of taxation, with regard to intangibles, as opposed to a valuation theory, as used in real and tangible personal property, reflects this concern. A Mr. Phillips observed:

" . . . If you are going into the field of classifying property, we should leave the General Assembly with the fullest authority the next ten to fifteen years to work out a good system in this state."
Debates, p. 6312

Thus, the conclusion is inescapable that the drafters of the 1945 Constitution intended the legislature to exercise wider powers with respect to classification of intangibles than on real property and tangible personal property, although Section 4(a) grants the power to classify in terms equally applicable to all property.

The promulgation of the new definition of yield, primarily affecting certain parent corporations and their affiliates, is within the power reserved to the General Assembly by the framers of the Constitution. The definition does not establish a new classification of intangible personal property based on the nature, residence or business of the owner or the amount owned.

The decision of General American Life Insurance Company v. Bates, supra, considered the question of what components the definition of yield could have. The provision attacked was one that excluded from yield ". . . amount of interest required to be credited by the owner thereof, during the preceding calendar year, to reserve liabilities of the owner maintained under the statutes of this state." Section 146.010, RSMo 1949. This

definition of yield was held not to contravene Sections 3, 4 or 6 of Article X of the Missouri Constitution. The contentions rejected in that case were that the uniformity clause requires all taxpayers similarly situated to be taxed uniformly; that the "yield" statutes create a subclass of owners of intangible personal property based solely on the business of the owners, and not on the nature and characteristics of the property as required by Section 4; and, to the extent the respondents were permitted to deduct the interest required to be credited to reserve liabilities from the gross returns received on intangible personal property, respondents were exempted from the payment of the intangible personal property tax, in contravention of Section 6. The court in General American Life Insurance Company, supra, at 466-467, stated that the provision under attack was designed to permit the taxpayer to arrive at the actual and true value of his intangible personal property for taxation purposes, and was not an exemption from taxation. It concluded:

" . . . the 'yield' statute provides for a deduction to reach the true and actual yield and not a fictitious yield, and is not an exemption of property from taxation, and that, so far as any classification may be concerned, it is based on the nature and characteristics of the intangible personal property involved." (at 467)

The court apparently was saying that there were grounds that could justify the deduction because the result would produce a figure subject to the intangible tax that reflected the particular value of the economic interest involved. The new definition could be similarly sustained on the basis that one could show that many inter-corporate loans are merely transfers of funds borrowed from another party. In any event, the statute, when measured by the standards of the Constitutional Convention and the General American Life Insurance case, is not invalid on its face and thus every presumption in favor of its constitutionality must be applied.

2. Application of Section 6. Section 6, in relevant part, states:

" . . . All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Since Section 4(b) of Article X provides that the intangible tax shall be based on the annual yield, Section 6 can be reconciled because the change in the definition of yield is merely one of definition to reach a determination of value deemed consistent

Honorable Warren E. Hearnes

with the intent of the intangible tax chapter by the legislature. It is not an exemption from taxation for ". . . property other than the property enumerated in this article, . . ." as prohibited by Section 6. Instead, it is no more than legislative recognition of the fact that transfers of funds between affiliated corporations do not, in reality, generate yield which is properly subject to taxation. See, General American Life Insurance Company v. Bates, supra.

CONCLUSION

It is the conclusion of this office that House Bill No. 537 does not violate the provisions of Article X of the Missouri Constitution and is therefore not unconstitutional.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Peter H. Ruger.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 241
5-17-71, Bild

Op. No. 105
3-16-67, David

COUNTY HOSPITALS:

A county hospital organized under the provisions of Sections 205.160, RSMo 1969 et seq., has authority to furnish food at cost to certain "shut-ins".

OPINION NO. 172

July 5, 1972

Honorable C. E. Hamilton, Jr.
Prosecuting Attorney
Callaway County, Courthouse
Fulton, Missouri 65251



Dear Mr. Hamilton:

This opinion is in answer to your question in which you ask:

"Can a county hospital sell meals to a not-for-profit corporation on a cost basis under the Missouri Statutes?"

You also state:

"The administrator of the Callaway Memorial Hospital in Fulton, Missouri, has been contacted by Ecumenical Ministries, a not-for-profit corporation, organized under Missouri Law, and Ecumenical Ministries has proposed a cooperative plan. Ecumenical Ministries desires that certain shut-ins in the Fulton area receive hot meals and they have agreed to provide transportation and pay for the cost of preparation of the meals if the Callaway Hospital will prepare them. The Callaway Hospital is willing to do this but is unsure as to whether such action would be authorized under Missouri Law. Apparently the cost of preparation would be paid out of hospital funds and then the hospital would be reimbursed by Ecumenical Ministries for just the cost of each meal. Hopefully, there would be neither loss nor profit on the part of the Callaway Hospital."

Honorable C. E. Hamilton, Jr.

In our view the key to the answer is in the intent of the legislature as expressed in the statutes respecting such county hospitals established pursuant to Sections 205.160 to 205.340, RSMo 1969. That is, Section 205.270, RSMo 1969, provides:

"Every hospital established under sections 205.160 to 205.340 shall be for the benefit of the inhabitants of such county and of any person falling sick or being injured or maimed within its limits, but every such inhabitant or person who is not a pauper shall pay to such board of hospital trustees or such officer as it shall designate for such county public hospital, a reasonable compensation for occupancy, nursing, care, medicine, or attendants, according to the rules and regulations prescribed by said board, such hospital always being subject to such reasonable rules and regulations as said board may adopt in order to render the use of said hospital of the greatest benefit to the greatest number; and said board may exclude from the use of such hospital any and all inhabitants and persons who shall willfully violate such rules and regulations. And said board may extend the privileges and use of such hospital to persons residing outside of such county, upon such terms and conditions as said board may from time to time by its rules and regulations prescribe."
(Emphasis added)

Further, Section 205.190, provides in part:

"Said board of hospital trustees shall have power to appoint a suitable superintendent or matron, or both, and necessary assistants and fix their compensation, and shall also have power to remove such appointees; and shall in general carry out the spirit and intent of sections 205.160 to 205.340 in establishing and maintaining a county public hospital." (Emphasis added)

In our Opinion No. 290, December 5, 1968, to Brewer, copy enclosed, we recognized that such a county hospital could provide an ambulance service under this broad grant of powers.

We do not have the precise plan before us and therefore we do not undertake to pass upon all the problems that may be involved.

Honorable C. E. Hamilton, Jr.

However, it is our view generally that such a hospital can furnish food at cost to certain "shut-ins", either directly or through an intermediary, and that such authority is derived from the hospital trustees' authority and duty to extend its services as broadly as possible to persons within the scope of such hospital services. The beneficiaries of such services must, in our view, be determined by the hospital, and not by the intermediary organization.

CONCLUSION

It is the opinion of this office that a county hospital organized under the provisions of Sections 205.160, RSMo 1969 et seq., has authority to furnish food at cost to certain "shut-ins".

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 290
12-5-68, Brewer

November 8, 1972

OPINION LETTER NO. 173
Answer by letter-Jones

William G. Brooks
Acting President
Lincoln University
Jefferson City, Missouri 65101

FILED

173

Dear Dr. Brooks:

This letter is to acknowledge receipt of a request from your predecessor for an opinion from this office which reads as follows:

"Are the 42 Lincoln University employees with fifteen or more years of service credit in the Missouri State Employees Retirement System prior to January 1, 1970; whose contributed funds still remain in the State Retirement System Pension Fund; who are, and have been, continuously employed by the State (although no longer contributing to the State Retirement System); and who must apply to the State Retirement System for retirement pension at the time of their retirement, eligible for refund of their contributions in addition to their normal pension, provided they retire on or after September 1, 1972 when the new law becomes effective?"

Senate Bill No. 548 which was passed by the 75th General Assembly and signed by the Governor, repeals certain statutory provisions of the Missouri State Employees Retirement System and enacts in lieu thereof new sections relating to the same subject matter. In this regard, subsection 4(1) of Section 104.330 of Senate Bill No. 548 provides as follows:

"4. (1) Any member, whose employment terminated on or after September 1, 1972 and (1) who had served six or more creditable service years as a member of the general assembly

Dr. William O. Brooks

and who has not been refunded his accumulated contributions to the fund, or (2) who was other than a member of the general assembly and who had served fifteen or more creditable service years as an employee, or who had served ten or more creditable service years as an employee and was at least thirty-five years of age at the date of termination of employment, and has not been refunded his accumulated contributions to the fund, if any, shall be entitled to a deferred normal annuity based on his creditable service, average compensation and the act in effect at the time his employment was terminated."

Also, subsection 2 of Section 104.372 of Senate Bill No. 548 provides as follows:

"2. When a member who was an employee on August 31, 1972, thereafter retires, or when a former member who has been restored creditable service in accordance with the provisions of subsection 4 or 6 of section 104.350 retires, or who is entitled to a deferred annuity under subsection 4 of section 104.330, the board shall pay him an amount equal to his accumulated contributions and credited interest to the date of his retirement. This amount is in addition to any retirement benefits to which he is entitled; but, the provisions of this subsection shall not apply to members who elect to receive benefits because of service in the general assembly."

The assumption is made that the opinion request refers to individuals who will not reenter state employment in the future. It is also our understanding that the individuals in question will retire on or after September 1, 1972, and will otherwise meet the eligibility requirement of Section 104.330 of Senate Bill No. 548.

In connection with the above statutes, there is authority for the proposition that statutes in pari materia must be read and construed together in order to keep all provisions of law on the same subject in harmony so as to work out and accomplish the central idea and intent of the lawmaking branch of state government. State ex rel. Day v. County Court of Platte County, 442 S.W.2d 178 (K.C. Mo.App. 1969). Therefore, when the refund provisions of subsection 2 of Section 104.372 are considered in relation to the eligibility provisions of subsection 4(1) of Section 104.330, it is our view that the clause "whose employment terminated on or after September 1, 1972" refers to the termination of employment with an agency that

Dr. William G. Brooks

is actively participating in the Missouri State Employees Retirement System. It should be noted that if the construction were otherwise, then individuals in the same category as those presently being considered, but who had taken a job with a private employer, would also be entitled to a refund of their contributions. We do not believe that the legislature intended such a result. Lastly, in Opinion Letter No. 22, Bode, 4-26-71 (copy enclosed), it was held that the amount of retirement benefits due a member of the retirement system who had ceased to be an employee of the state sometime prior to his normal retirement date, but was at least sixty years of age and had accumulated fifteen or more years of creditable service or served six or more years as a member of the General Assembly, and had not been refunded his accumulated contributions to the fund, were determined under the law in effect at the time the member ceased to be an employee of the state. It is submitted that a similar conclusion is applicable to individuals who terminate employment with agencies not actively participating in the Missouri State Employment Retirement System.

In conclusion, it is our opinion that the Lincoln University employees in question will not be eligible for a refund of their contributions in addition to their normal retirement benefits, provided they retire after September 1, 1972.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. Ltr. No. 22
4-26-71, Bode



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

June 23, 1972

OPINION LETTER NO. 174

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri, 65101

Dear Commissioner Mallory:

In accordance with your request of May 8, 1972, we have reviewed the Missouri State Board of Education's "Application for Program Grant for Migratory Children (fiscal year 1972)." This application is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended by P.L. 89-750, P.L. 90-247 and P.L. 91-230 (Section 20 U.S.C. Section 241 e(c)(1)).

In addition to the Elementary and Secondary Education Act of 1965 as amended, and the regulations pursuant thereto (45 C.F.R. 116, January 1, 1972 edition), our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Sections 161.092 and 178.430, RSMo 1969.

Based on the foregoing, we hereby certify that the Missouri State Board of Education has authority under State law to perform the duties and functions of a "state educational agency" as defined in Title I of Public Law 89-10 (20 U.S.C. Section 244), including those arising from the assurances set forth in the application, and that the State Board of Education has the authority to submit and administer the special educational programs and projects for migratory children as set forth in the application.

All provisions of this application are consistent with State law with the exception of paragraph 11 B. 1. on page 9 of the application.

Dr. Arthur L. Mallory

This opinion letter constitutes our official certification and should be inserted in the appropriate place in each copy of the application.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

ELECTIONS:

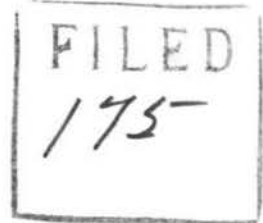
POLITICAL PARTIES:

The American Party is not a "political party" on a statewide basis in Missouri and therefore cannot nominate presidential electors at a convention of such alleged party. It is the further opinion of this office that under Section 120.160, RSMo, a new political party can be formed and presidential electors nominated by filing the required petitions. Such petitions must be filed in the office of the Secretary of State no later than July 31 of even-numbered years.

OPINION NO. 175

June 21, 1972

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This opinion is rendered in response to your request asking whether the American Party is authorized to nominate presidential electors in the state of Missouri at a state convention of such party under the provisions of Section 120.840, RSMo, or whether voters of this state can nominate presidential electors in this state pledged to vote for the presidential and vice presidential candidate of the American Party only by forming a new party and nominating presidential electors of such party by petitions under Section 120.160, RSMo.

Your question is answered by Opinion No. 588, rendered December 18, 1970 to James C. Kirkpatrick, a copy of which we enclose, which held that the American Party is no longer an "established political party" for the purpose of nominating candidates for any statewide office in the state of Missouri because the only statewide candidate of such party in the 1970 general election received less than two percent of the vote cast at such election. This holding was based upon the provisions of Section 120.160(5), quoted in such opinion. Such section provides that after a new political party is established, if in any ensuing election such party fails to have a candidate or fails to receive two percent of the total vote cast at such election in the state, the party shall no longer be an "established party" on a statewide basis. In view of the fact that the American Party received less than two percent of the

Honorable James C. Kirkpatrick

vote for any statewide candidate at the November 1970 election, it is therefore no longer an established political party insofar as statewide elections are concerned.

Section 120.140, RSMo Supp. 1971, provides in part as follows:

"The term 'political party' as used in sections 120.140 to 120.240 shall mean any 'established political party' as hereinafter defined and shall also mean any political group which shall hereafter undertake to form an established political party provided for in sections 120.140 to 120.240; . . ."

While Section 120.140 restricts the definition of a "political party" to its use in Sections 120.140 to 120.240, it is our view that the term "political party" as used in the Election Laws generally in this state refers to an "established political party" as such term is used in Section 120.160, which provides for the establishment of new political parties.

The American Party was originally formed under provisions of Section 120.160, RSMo, by petitions and became an established political party in this state, as provided in such section, when it received more than two percent of the vote in the 1968 general election. It is our view that this is the only method for establishing a new political party in this state and that a new political party is in all respects subject to the provisions of Section 120.160 to determine whether or not it ceases to be a political party on a statewide basis.

Section 120.840, RSMo, provides that the state committee of any "political party" may call a convention of delegates for the purpose of nominating presidential electors. However, it is our view that the term "political party" used in Section 120.840 means an "established political party" as such term is used in Section 120.160, the statute under which a new political party is authorized to be formed and under which the American Party was formed in this state.

It is therefore our view that since the American Party no longer exists on a statewide basis in Missouri there is no authority for such political party to hold a convention at which presidential electors are nominated. However, a new political party may be formed under Section 120.160 and electors nominated by submitting proper petitions. Such petitions must be filed not later than July 31 of even-numbered years.

Honorable James C. Kirkpatrick

CONCLUSION

It is the opinion of this office that the American Party is not a "political party" on a statewide basis in Missouri and therefore cannot nominate presidential electors at a convention of such alleged party. It is the further opinion of this office that under Section 120.160, RSMo, a new political party can be formed and presidential electors nominated by filing the required petitions. Such petitions must be filed in the office of the Secretary of State no later than July 31 of even-numbered years.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 588
12-18-70, Kirkpatrick

CONVICTS:
PRISONERS:
PAROLE & PROBATION:
INTERSTATE COMPACT:

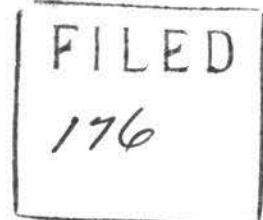
1. A parole hearing may be had before officials of a receiving state pursuant to the Interstate Corrections Compact. 2. The Board of Probation and Parole of the

State of Missouri may hold a parole interview or hearing in a state, other than Missouri, for an inmate sentenced to the Missouri Department of Corrections who has been transferred pursuant to the Interstate Corrections Compact. 3. The Director of the Department of Corrections may authorize the removal to the State of Missouri, for a parole interview or hearing, of an inmate who has been transferred to an institution without the State of Missouri pursuant to the Interstate Corrections Compact. 4. Parole interviews, or hearings, may be held before transfer for those inmates who are transferred to other states pursuant to the Interstate Corrections Compact.

OPINION NO. 176

August 7, 1972

Mr. Walter G. Sartorius, Chairman
Missouri Board of Probation and Parole
Post Office Box 267
Jefferson City, Missouri 65101



Dear Mr. Sartorius:

This is in reply to your request for an opinion of this office concerning a construction of your duties under the Interstate Corrections Compact, Section 222.260, RSMo Supp. 1971. Your request concerns whether, for the purposes of a parole interview, or hearing, when an inmate sentenced to the Department of Corrections of the State of Missouri is transferred to an institution of another party to the Interstate Corrections Compact it is the responsibility of the Department of Corrections to return the inmate to the State of Missouri for that hearing; or whether it is incumbent upon the Board of Probation and Parole to interview the inmate, and hold the hearing, at the institution without the State of Missouri.

Our research indicates that the answer to your question is one involving a policy discretion, therefore we shall merely list the options available to the Board of Probation and Parole in this regard.

I

THE PAROLE HEARING MAY BE HAD BEFORE OFFICIALS OF THE RECEIVING STATE.

Mr. Walter G. Sartorius

Pursuant to the Interstate Corrections Compact, Section 222.260, RSMo 1969, the parole hearing may be had before officials of the receiving state with the proceedings being transcribed, and the determination of whether to grant parole remaining in the hands of the Missouri Board of Probation and Parole. Reference should be had to the Interstate Corrections Compact. Article IV(f), in pertinent part, states:

"Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state or of the receiving state if authorized by the sending state. . . . In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state."

From the above, we conclude that the appropriately designated officials of a state to whom an inmate sentenced to the Missouri Department of Corrections is transferred may hold a parole interview, or hearing, make a record, and transmit that record to the Board of Probation and Parole of the State of Missouri for the Missouri Board's determination. To the extent that the Interstate Corrections Compact could be read to be inconsistent with Missouri statutes, the Interstate Compact prevails. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959); *Ruan Transport Corporation v. Missouri Highway Reciprocity Commission* (Mo. Sup. en banc 1963) 369 S.W.2d 220.

II

THE BOARD OF PROBATION AND PAROLE OF THE STATE OF MISSOURI MAY HOLD A PAROLE INTERVIEW OR HEARING IN A STATE, OTHER THAN MISSOURI,

Mr. Walter G. Sartorius

FOR AN INMATE SENTENCED TO THE MISSOURI DEPARTMENT OF CORRECTIONS
WHO HAS BEEN TRANSFERRED PURSUANT TO THE INTERSTATE CORRECTIONS
COMPACT.

Pursuant to the Interstate Corrections Compact, Article IV(f), the Board of Probation and Parole of the State of Missouri may hold a parole interview, or parole hearing, in a state to which an inmate sentenced to the Missouri Department of Corrections has been transferred. That section, in pertinent part, reads:

"Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state.
. . ."

Clearly, the foregoing statute contemplates a hearing such as a parole interview, and thus our conclusion is the Board of Probation and Parole of the State of Missouri may hold parole interviews or hearings in an institution without the State of Missouri to which an inmate sentenced to the State Department of Corrections has been transferred.

III

THE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS MAY AUTHORIZE
THE REMOVAL TO THE STATE OF MISSOURI OF AN INMATE WHO HAS BEEN
TRANSFERRED TO AN INSTITUTION WITHOUT THE STATE OF MISSOURI FOR A
PAROLE INTERVIEW OR HEARING.

Reference should be had to Article IV(c) of the Interstate Corrections Compact. That section reads:

"Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; . . ."

Mr. Walter G. Sartorius

The foregoing provision of the Interstate Corrections Compact clearly authorizes, for the purposes of a parole interview or hearing, that the Director of the State Department of Corrections [see Section 222.250, RSMo Supp. 1971] may authorize the removal to the State of Missouri of an inmate who has been transferred to another state pursuant to the Interstate Corrections Compact.

IV

PAROLE INTERVIEWS, OR HEARINGS, MAY BE HELD BEFORE TRANSFER FOR THOSE INMATES WHO ARE TRANSFERRED TO OTHER STATES PURSUANT TO THE INTERSTATE CORRECTIONS COMPACT.

As you indicate in your opinion request, in an attempt to resolve this situation, an agreement has been had between the Missouri Department of Corrections and the Board of Probation and Parole of the State of Missouri, in that the Department of Corrections has agreed to have the inmate in Missouri made available to the Board for the purpose of conducting a parole hearing prior to transferring him to another jurisdiction. Our reading of the Interstate Corrections Compact, with a contemporaneous reading of Section 549.261, RSMo 1969, indicates that this procedure would be proper.

CONCLUSION

It is the conclusion of this office that:

1. A parole hearing may be had before officials of a receiving state pursuant to the Interstate Corrections Compact.
2. The Board of Probation and Parole of the State of Missouri may hold a parole interview or hearing in a state, other than Missouri, for an inmate sentenced to the Missouri Department of Corrections who has been transferred pursuant to the Interstate Corrections Compact.
3. The Director of the Department of Corrections may authorize the removal to the State of Missouri, for a parole interview or hearing, of an inmate who has been transferred to an institution without the State of Missouri pursuant to the Interstate Corrections Compact.
4. Parole interviews, or hearings, may be held before transfer for those inmates who are transferred to other states pursuant to the Interstate Corrections Compact.

Mr. Walter G. Sartorius

The foregoing opinion, which I hereby approve, was prepared by my assistant Kenneth Romines.

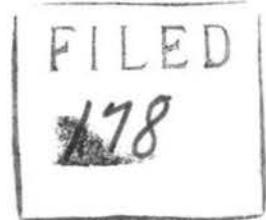
Yours very truly,


JOHN C. DANFORTH
Attorney General

June 6, 1972

OPINION LETTER NO. 178
Answer by letter-Wieler

Mr. B. W. Robinson
Assistant Commissioner
Director, Vocational Education
Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Robinson:

This is in answer to your request for our review of the annual revision of the State Plan for Vocational and Technical Education in Missouri, said revision being necessary under the provisions of the Vocational Education Act of 1963, Public Law 88-210, as amended in 1968 by Public Law 90-576 (20 U.S.C., Section 1241 et seq.).

It is the opinion of this office that the Missouri State Board of Education is the "state board" in this state within the meaning of Section 108(8) of Public Law 90-576. Also, we find that the Missouri State Board of Education has the authority under state law to submit a State Plan for Vocational Education and to administer or supervise the administration of same. See Sections 178.420 to 178.580, RSMo 1969. Further, we think that the provisions of this Plan can be carried out by the state; and we note that the Commissioner of Education has been duly authorized by the Missouri State Board of Education to submit the State Plan for Vocational and Technical Education in Missouri and to represent the Missouri State Board of Education in all matters pertaining thereto. See Section 178.540, RSMo 1969.

In conjunction with this letter opinion which constitutes our official certification of the application, we have completed the required certification form.

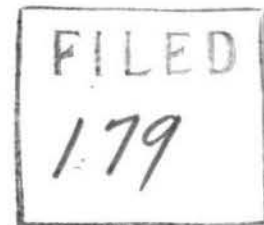
Yours very truly,

JOHN C. DANFORTH
Attorney General

June 6, 1972

OPINION LETTER NO. 179
Answer by Letter - Nowotny

Mr. Clifford L. Summers
Executive Director
Water Resources Board
Post Office Box 271
Jefferson City, Missouri 65101



Dear Mr. Summers:

This is in reply to your request for an official opinion of this office as to whether the counties and cities in Missouri can: (1) agree under long-term contract with the United States to provide operation, maintenance and replacement of federally financed water control projects and to agree to reimburse the federal government for all or part of those added costs associated with identified local benefits or uses, in return for investment by the federal government in these projects; and (2) can they further agree to hold and save the United States free from damages due to the construction works and, if so, do they have legal authority to pay damages for failure to perform.

Section 70.115, RSMo 1969, provides as follows:

"Any county or city in which the corps of engineers of the United States army or any other department or agency of the government of the United States is authorized by congress to construct works for recreational purposes along any river or tributary thereof lying within or adjacent to the city or county may, if in the opinion of the governing body of the county or city the construction is for the public welfare:

Mr. Clifford L. Summers

(1) Enter into an undertaking in the name of the county or city to hold the United States free from any damage to persons or property resulting during construction or after completion thereof;

(2) Contract with the government of the United States in the name of the county or city to maintain, keep in repair and operate the works, when completed; and

(3) Furnish all necessary lands, rights-of-way and easements for construction of the works."

Therefore, it is our opinion that the counties and cities in Missouri have the necessary authority to enter into such agreements.

Very truly yours,

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

September 15, 1972

OPINION LETTER NO. 185

Mr. Joseph Jaeger, Jr.
Director of State
State Park Board
Post Office Box 176
Jefferson City, Missouri 65101

Dear Mr. Jaeger:

You have requested my opinion on the following question:

"Does the Missouri State Park Board have the legal authority to permit the Internal Revenue Service to store seized vehicles on certain lands under its jurisdiction and to permit the service to advertise for bids for the sale of these vehicles while so stored?"

You also state that the lands involved are part of the Lake of the Ozarks State Park and that the Internal Revenue Service desires to utilize the enclosed lot of the Central Warehouse at such park for temporary storage of motor vehicles pending sale upon competitive bid by the Service.

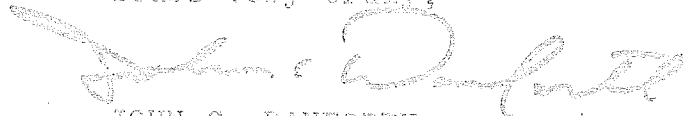
The lands forming the Lake of the Ozarks State Park were conveyed to the state of Missouri from the United States of America by quitclaim deed dated October 10, 1946. The deed was made subject to "the express condition that the state of Missouri shall use the said property exclusively for public park, recreational, and conservation purposes" and with provision for reverter of title and right to possession to the United States "upon a finding by the Secretary of the Interior, after notice to the state of Missouri and after opportunity for a hearing, that the said state has not complied with the aforesaid condition during a period of more than three years, which finding shall be final [and] conclusive." These conditions literally conform with the terms of the enabling legislation. Act of June 6, 1940, 56 Stat. 327, 16 U.S.C. §§ 459r-459t.

Mr. Joseph Jaeger, Jr.

We doubt that the storage of vehicles seized by the Internal Revenue Service is a "public park, recreational and conservation purpose," and consequently, we feel that the "exclusive use" condition contained in the transfer of the real property to the state might be offended by such storage. Although the reverter of title and right to possession to the United States is dependent upon a finding by the Secretary of the Interior that the state of Missouri has not complied with the condition "during a period of more than three years," we do not think it advisable for the state, acting through the Park Board, to breach the "exclusive use" condition for any length of time. Furthermore, under state law the Park Board is only authorized to improve, maintain, operate and regulate lands held by it for "park or parkway purposes." Section 253.040, RSMo. We thus feel that for the Park Board to allow the storage of seized motor vehicles by the Internal Revenue Service would also exceed the Board's authority under state law.

For the above reasons, it is our opinion that the Missouri State Park Board has no legal authority to permit the storage of automobiles seized by the Internal Revenue Service upon lands belonging to the Lake of the Ozarks State Park.

Yours very truly,



JOHN C. DANFORTH
Attorney General

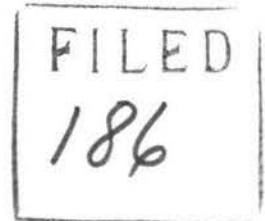
SCHOOLS:
TEACHERS:

A Missouri state college or university, under Section 168.021, RSMo 1969, has the authority to issue the degree of bachelor of science in education without granting a life teaching certificate if the candidate does not present evidence of good moral character, as required by Section 168.031, RSMo 1969. The issuing authority's procedures for concluding that evidence of good moral character has not been presented should conform to recognized standards of fairness.

October 24, 1972

OPINION NO. 186

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This official opinion is issued in response to your request for a ruling on whether a Missouri state college, under Section 168.021, RSMo 1969, has the authority to issue the degree of bachelor of science in education without granting a life teaching certificate if the candidate does not present evidence of good moral character, as required by Section 168.031, RSMo 1969.

We understand that the student has fulfilled the academic requirements for the degree. Therefore, no question is raised concerning the granting of a degree. The only question posed is whether the degree may be issued without granting authorization to teach in the public schools of Missouri. (Section 174.160, RSMo 1969, grants state colleges the power and authority to confer degrees.)

As relevant to this opinion, Section 168.021, RSMo 1969, provides as follows:

"Issuance of licenses. -- Certificates of license to teach in the public schools of the state shall be granted as follows:

* * *

"(2) By the Missouri state colleges, state teachers' colleges, the university of Missouri and Lincoln university to graduates receiving the degree of bachelor of science

Dr. Arthur L. Mallory

in education, a life teaching certificate bearing the signature of the commissioner of education and which shall be registered in the state department of education. . . ."
(Emphasis added.)

Although Section 168.021 authorizes the enumerated state educational institutions to issue life teaching certificates, no teaching certificate may be issued except after presentation by the applicant of evidence of good moral character.

"No person shall receive or hold any certificate who does not present evidence of good moral character, . . ." Section 168.031, RSMo 1969. (Emphasis added.)

Thus, good moral character must be demonstrated before the certificate is granted. (See Opinion No. 6, Bell, July 28, 1961.) When an applicant has the required amount of academic and professional preparation and has presented evidence of good moral character, the certificate must be issued. (See Opinion No. 164, Wheeler, June 2, 1966.)

However, if a student cannot present evidence of good moral character to the issuing authority (in this instance, a state educational institution), no teaching certificate can be issued. Section 168.031. Under such circumstances, we find nothing which would prevent the college or university from granting the degree without the teaching certificate.

We must, however, express a word of caution on the procedure for determining that evidence of good moral character has not been presented. We assume that the student, in fulfilling the academic requirements for the degree of bachelor of science in education, intended to enter the teaching profession. To deny a lifetime teaching certificate for lack of good moral character means that the graduate will not be permitted to teach in Missouri public schools. Thus, we suggest that every effort be made to insure that the procedure for denying the certificate be in accordance with recognized standards of fairness. Notice to the student of the issuing authority's proposed action and reasons therefor together with an opportunity to appear before the issuing authority at a hearing where, the graduate would have the opportunity to present evidence and cross-examine adverse witnesses, should be included in the procedure.

Dr. Arthur L. Mallory

CONCLUSION

Therefore, it is the conclusion of this office that a Missouri state college or university, under Section 168.021, RSMo 1969, has the authority to issue the degree of bachelor of science in education without granting a life teaching certificate if the candidate does not present evidence of good moral character, as required by Section 168.031, RSMo 1969. The issuing authority's procedures for concluding that evidence of good moral character has not been presented should conform to recognized standards of fairness.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosures:

Opinion No. 6, Bell, 7-28-61
Opinion No. 164, Wheeler, 6-2-66

November 16, 1972

OPINION LETTER NO. 188
Answer by Letter - Almstedt

Mr. Peter W. Salsich, Chairman
Missouri Housing Development Commission
3642 Lindell Boulevard
St. Louis, Missouri 63108



Dear Mr. Salsich:

Pursuant to your opinion request and the letters addressed to this office, a summation of the facts upon which your request is based would be the following:

On July 19, 1971, a certain individual (hereinafter designated employee) joined the staff of the Missouri Housing Development Commission (MHDC) and thereafter on March 1, 1972, submitted a notice of resignation to become effective March 31, 1972. On March 3, 1972, the employee and Mr. William R. Moore, Executive Director of MHDC, met with Mr. John Gibson, President of St. Louis Joint Executive Board -- Hotel and Restaurant Employees and Bartenders International/AFL-CIO (International) to discuss International's proposal to rehabilitate the Forest Park Hotel, St. Louis, Missouri, under Section 236 of the National Housing Act. The interim and permanent mortgage financing was proposed to be provided by MHDC (MHDC-72-126 project).

Between March 3, 1972, and March 31, 1972, the employee had contact with the MHDC-72-126 project in relation to the preparation of a feasibility study for said project. After the employee left the employ of MHDC, a formal

Mr. Peter W. Salsich

application of the MHDC-72-126 project was submitted to the Executive Director of MHDC on April 24, 1972 wherein it was stated that the employee was a consultant for the project on behalf of the private promoter with allowable compensation. Thereafter, a formal presentation of the application was made to MHDC on May 17, 1972 during the May meeting of the Commission members.

Your question presented to this office is whether the employee's involvement with the MHDC-72-126 project on behalf of the private promoter constitutes a violation of Section 105.450, RSMo 1969, et seq., (conflict of interest law) if the MHDC were to authorize participation in such project.

Section 105.480, RSMo 1969, provides:

"1. No person who has served as an officer or employee of an agency shall within a period of two years after the termination of the service or employment appear before the agency or receive compensation for any services rendered on behalf of any person, firm, corporation or association in relation to any case, proceeding or application with respect to which the person was directly concerned and in which he personally participated during the period of his service or employment.

"2. Nothing herein contained shall be construed to prohibit any firm or association, in which any officer or employee of an agency is a member, from appearing, rendering services in relation to any matter before, or transacting business with the agency, where the officer or employee of the agency does not share in the profits resulting therefrom. Any person failing to comply with the provisions of this section shall, upon conviction, be adjudged guilty of a misdemeanor and be subject to a fine of not more than five hundred dollars or confinement in the county jail for not more than one year, or both."

By previous opinion of this office, No. 19, March 3, 1966, Warden, copy enclosed, the scope of the Missouri conflict of interest laws was sufficiently explained. Pursuant to the definition of "agency" in Section 105.450, RSMo 1969, the MHDC and

Mr. Peter W. Salsich

its employees fall within the proscriptions of Sections 105.450 RSMo 1969, et seq. Furthermore, according to the facts above outlined, the employee of MHDC during the month of March, 1972, worked on the MHDC-72-126 project and after his resignation served as a paid consultant for that project's private promoter.

Section 105.480(1), supra, specifically prohibits the employee for a period of two years from the date of March 31, 1972, from in any manner "appear[ing] before the agency or receiv[ing] compensation for any services rendered on behalf of any person, firm, corporation or association in relation to any case, proceeding or application with respect to which the person was directly concerned and in which he personally participated during the period of his service or employment." (Section 105.480(1), supra). The latter section of Missouri law applies specifically to the employee's activities in relation to project MHDC-72-126. Such section renders his activities in relation to said project on behalf of the private promoter in violation of the Missouri conflict of interest laws if, in fact, it is determined that the employee "was directly concerned" and "personally participated" in the MHDC-72-126 project when employed by MHDC.

This opinion, however, is not to be read as prohibiting any action on the part of MHDC in either approving or disapproving project MHDC-72-126. The actions of the employee by themselves would constitute a violation of the Missouri conflict of interest laws.

It is the opinion of this office that the actions of the employee while with MHDC and subsequent to his termination from MHDC in serving as a paid consultant to the private promoter of the MHDC-72-126 project would constitute a violation of the Missouri conflict of interest laws if, in fact, it is determined that the employee "was directly concerned" and "personally participated" in the MHDC-72-126 project when employed by MHDC. Such a determination is made without the necessity of considering whether MHDC took or is to take any affirmative action towards the approval of the MHDC-72-126 project.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 19
3/3/66, Warden

July 21, 1972

OPINION LETTER NO. 189
Answer by letter-Jones

Mr. Clyde Burch
College Attorney
Northeast Missouri State College
Kirksville, Missouri 63501



Dear Mr. Burch:

This letter is to acknowledge receipt of your request for an opinion from this office in regard to whether the passage of Senate Bill No. 427, by the Second Regular Session of the 76th General Assembly, by implication excludes state college teachers from membership in the Public School Retirement System of Missouri.

Senate Bill No. 427, Second Regular Session of the 76th General Assembly, which will be effective August 13, 1972, repeals Section 174.030, RSMo 1969, and enacts in lieu thereof, one new section which reads as follows:

"174.030. The board of regents of each state teachers college may in its discretion change the name of its college as provided by section 174.020 by eliminating from the name of the institution the words 'teachers college' or any of such words and to add the word 'university' in lieu of the word 'college', and to change the name of the board as provided by section 174.040 by eliminating therefrom the word 'teachers' and to add thereto the word 'university' in lieu of the word 'college'; and thereafter the institutions and boards shall have and enjoy the same rights and privileges as are granted to teachers colleges by law, but nothing herein contained shall be construed to grant authority to such institutions to confer post graduate degrees except those

Mr. Clyde Burch

which may be necessary to the training of teachers for the free public schools of the state, or degrees other than those in education and arts and sciences, nor does it grant additional powers or authorities to those institutions or or those boards not enjoyed by other colleges or boards whose names are not changed."
(Emphasis ours)

The Public School Retirement System of Missouri is provided for in Sections 169.010 through 169.130, RSMo 1969, for the purpose of providing retirement allowances and other benefits for certain public school teachers. In this regard, the phrase "public school" is defined in part in subsection 12 of Section 169.010, RSMo 1969, as follows:

"(12) 'Public School' shall mean any school conducted within the state under the authority and supervision of . . . the board of regents of the several state teachers' colleges, or state colleges, . . ."

Also, the word "teacher" as defined in part in subsection 16 of Section 169.010, RSMo 1969, as follows:

"(16) 'Teacher' shall mean any teacher, teacher-secretary, substitute teacher, supervisor, principal, supervising principal, superintendent or assistant superintendent, school nurse, or librarian who shall teach or be employed by any public school, state college or state teachers' college on a full-time basis . . . provided, that this clause shall not be construed to include employees of the university of Missouri or Lincoln university;" (Emphasis ours)

It is a well known rule of statutory construction that repeals by implication are not favored; and in order for a later statute to operate as a repeal by implication of an earlier statute, there must be such manifest and total repugnance that the two cannot stand. In addition, even where two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the earlier one by implication and if statutes are not irreconcilably inconsistent both must stand. State v. Ludwig, 322 S.W.2d 841 (Mo. banc 1959) and State ex rel. Preisler v. Toberman, 269 S.W.2d 753 (Mo. banc 1954). Furthermore, the primary rule of statutory construction is to ascertain and give effect to legislative intent, and in so doing courts should give words used their plain and ordinary meaning. City of Kirkwood v. Allen, 399

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S.W.2d 30 (Mo. banc 1966). In this connection, Senate Bill No. 427 provides that a board of regents of a state teachers' college may eliminate the words "teachers' college or any of such words" from the name of the institution and substitute the word "university" for the word "college." However, it is to be noted that this legislation also provides that a state teachers' college which initiates action to change its name, shall nevertheless have and enjoy the same rights and privileges as are granted to it by law, and does not receive additional powers or authority, not enjoyed by other colleges or boards whose names are not changed. As a result, it is our view that the legislature did not intend by the passage of Senate Bill No. 427 that the legal status of a state teachers' college was to be changed, other than the board of regents of each state teachers' college having discretionary authority to substitute the word "university" for the words "teachers' college" or for the word "college" in the name of the institution.

It is, therefore, our opinion that the passage of Senate Bill No. 427 by the Second Regular Session of the 76th General Assembly does not exclude state teachers' college teachers from membership in the Public School Retirement System of Missouri.

Yours very truly,

JOHN C. DANFORTH
Attorney General

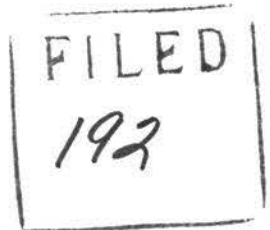
OFFICERS:
CITY OFFICERS:
COUNTY OFFICERS:
CITY ASSESSOR:
COUNTY ASSESSOR:
CONFLICT OF INTEREST:

1. A person whose name is written in on a ballot at the general election for city assessor in a third class city who receives a majority of the votes cast is elected city assessor. 2. The county assessor in a county of the third class can also hold the office of city assessor in a third class city.

OPINION NO. 192

August 16, 1972

Honorable Zane White
Prosecuting Attorney
Phelps County Courthouse
Rolla, Missouri 65401



Dear Mr. White:

This is in response to your request for an opinion from this office as follows:

"I request an Attorney General Opinion as to whether or not the County Assessor in a County of a third class can also hold the office of City Assessor in a City of a third class?

"Facts are that no one filed for the office of City Assessor of the City of Rolla. The County Assessor of Phelps County received the largest number of write-in votes and has requested this opinion to see whether or not he may hold both offices."

You state no candidate filed for the office of city assessor of Rolla and the county assessor received the largest number of write-in votes for city assessor.

Section 77.370, RSMo, provides for the city assessor of a third class city to be elected.

The first question is whether it is legal for a voter in an election for city assessor to write on the ballot the name of the person he chooses for such public office who is not a candidate and whether such vote should be counted for the person whose name is written on the ballot.

Honorable Zane White

In *Kasten v. Guth*, 375 S.W.2d 110 (Mo. 1964) the court held the person who received the most votes for county superintendent of schools, although his name was written in, was elected as county superintendent of schools. In discussing this question, the court stated, l.c. 115:

"In 29 C.J.S. Elections § 180, pp. 263, 265, it is stated that 'a candidate for public office is generally entitled to have his name written upon the official ballot by voters who desire to support him as their choice, although he has not been nominated by any convention, caucus, or meeting, and under most statutes, when an elector desires to vote for a person whose name is not on the ballot he may do so by writing his name on the ballot in an appropriate place, notwithstanding the person whose name is thus written in was not eligible to have his name printed on the ballot. * * *'
..."

It is our opinion that, under the facts as submitted, the county assessor who received the largest number of votes for city assessor was elected as city assessor.

The question now arises as to whether the county assessor of Phelps County, a third class county, can qualify for the office of city assessor of a third class city and thus hold both offices if otherwise qualified.

We know of no specific statute or constitutional provision that would prohibit the simultaneously holding of the office of assessor of a third class county and the office of city assessor of a third class city; and, therefore, we must turn to the common law rule to determine this question.

The common law rule was stated in the case of *State ex rel. Walker v. Buss*, 135 Mo. 325, 36 S.W. 636, 639-640 (1896) as follows:

". . . At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two,--some conflict in the duties required of the officers, as where one has some supervision of the others, is required to deal with, control, or assist him.

Honorable Zane White

It was said by Judge Folger (People v. Green, 58 N. Y. 295): 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that "incompatibility" from which the law declares that the acceptance of the one is the vacation of the other. The force of the word in its application to this matter is that, from the nature and relations to each other of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one towards the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm, and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must per se have the right to interfere, one with the other, before they are incompatible at common law.' . . ."

We must examine statutes relating to the duties of the two offices in question to determine whether there is such an inconsistency in the functions of the office as to render them incompatible. Section 53.010, RSMo, provides that in each county of this state, except those under township organization, shall elect a county assessor.

Section 53.030, RSMo, provides that each assessor shall assess all of the real and tangible personal property in the county of which he assesses at what he believes to be the actual cash value.

Section 94.010, RSMo, applies to the assessment of property in third class cities. It provides as follows:

"1. Except as hereinafter provided, in assessing property, both real and personal, in cities of the third class, the city assessor shall, jointly with the county or township assessor, assess all property in such city, and such assessment, as made by the city assessor and county or township assessor jointly, and after the same has been passed upon by the board of equalization, as herein provided for, shall be taken as the basis from which the city council shall make the levy for city purposes; and for

Honorable Zane White

the purpose of giving cities of the third class representation on the county board of equalization, when said board is sitting for the purpose of equalizing the assessment on such city property, the mayor and city assessor shall sit with the county board of equalization when the said board is passing upon the assessment of such city property, and shall each have a vote in said board, and they shall be paid for such service the same amount per day and out of the same fund as other members of such board of equalization.

"2. The assessment of city property as made by the city and county assessor shall conform to each other, and after such board of equalization has passed upon such assessment and equalized the same, the city assessor's book shall be corrected in red ink in accordance with the changes made by the board of equalization, and so certified by said board, and then returned to the city council."

Under this statute the city assessor in a third class city is required to, jointly with the county assessor, assess all the property in such city, and such assessment, as made by the city assessor and county assessor jointly, and after the same has been passed upon by the board of equalization, be taken as the basis from which the city council shall make the levy for city purposes. It requires the assessment of city property as made by the city and county assessors shall be the same.

It is our view that there is no incompatibility existing between these two offices. Neither office is superior to the other nor does one office have supervision over the other. In fact, under this statute, the assessed value of the property for city purposes must be the same as the assessed value of property for county purposes. Therefore, it is our view that the county assessor in a county of the third class can also hold the office of city assessor in a city of the third class.

CONCLUSION

It is the opinion of this office that:

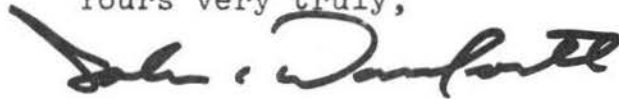
1. A person whose name is written in on a ballot at the general election for city assessor in a third class city who receives a majority of the votes cast is elected city assessor.

Honorable Zane White

2. The county assessor in a county of the third class can also hold the office of city assessor in a third class city.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

November 9, 1972

OPINION LETTER NO. 193

Honorable William H. Bolinger
Prosecuting Attorney
Morgan County
East Newton Street
Versailles, Missouri 65084

Dear Mr. Bolinger:

This letter is in response to your request for an opinion asking whether it is proper to deduct magistrate fees and certain other court costs (including sheriff's fees and witnesses' fees) from bail forfeitures before transferring the proceeds of same to the county treasurer for school uses as required by Article IX, Section 7, Constitution of Missouri.

Article IX, Section 7 of the Missouri Constitution states in part:

" . . . All interest accruing from investment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the state, the net proceeds from the sale of estrays, and all other moneys coming into said funds shall be distributed annually to the schools of the several counties according to law."

Further, Section 166.131, RSMo 1969, states in part:

" . . . Annually, on or before August thirty-first, in each county of the state all interest accruing from the investment of the capital of the county school fund, if any, the

clear proceeds of all penalties, forfeitures and fines collected for any breach of the penal laws of the state, the net proceeds from the sale of estrays, and all other money lawfully coming into the fund, shall be collected and distributed to the school districts of the county by the county clerk upon the basis of the last enumeration on file in his office.

. . . "

The Missouri cases which have interpreted the "clear proceeds" provision of what is now Article IX, Section 7, held that the legislature may authorize deductions from the gross proceeds in certain instances. For example, in State v. Wabash, St. L. & P. Ry. Co., 1 S.W. 130 (Mo. 1886), the Missouri Supreme Court was confronted with a statute which provided that one-half of the penalty in a case where an individual failed to ring a bell or sound a whistle at a public crossing went to the informer. Our court held that the Missouri Legislature,

" . . . in imposing penalties for violation of its laws, may, in its discretion, for the purpose of securing the enforcement of said laws, the collection of the penalties imposed, and paying the expenses thereof, give a part thereof to an informer, and, in such case, what is thus realized constitutes the 'clear proceeds of said penalties,' . . . "

See also, State v. Missouri Pac. Ry. Co., 50 S.W. 278 (Mo. 1899). Thus, the court held that the state legislature could, to some extent, determine what was to be deducted from fines and forfeitures before same constituted "clear proceeds" for school uses. In State v. Warner, 94 S.W. 962, 966 (Mo. 1906), the Supreme Court of Missouri was confronted by a statute which provided that fines and forfeitures resulting from violations of certain fish and game laws were to be put by the county treasurer into a fund called Game Protection Fund. A county treasurer received a fine arising from such a violation and applied it to the school fund. A mandamus suit was brought against him to compel him to dispose of the money in accordance with the fish and game statutes. The defense was that the statute was in violation of the constitutional "clear proceeds" provision. The Supreme Court found the statute to be an unconstitutional infringement upon the Constitution. We quote from that case:

"(c) But where fines and penalties are prescribed as a punishment for a violation of public rights, i.e., crimes, and such penalties or fines are to be recovered by public

Honorable William H. Bolinger

authority, the disposition of such recovered fines or penalties comes within the constitutional provision under consideration, and they may not be turned awry from the prescribed constitutional course. (d) And, under the last hypothesis, the question of 'clear proceeds' confronts us. It seems, though that question is not in this case and is not decided, that a criminal statute might devote a reasonable portion of recovered fines and penalties by way of incentive or spur to officers in collecting them and enforcing the law; and that, after such appropriation of a part, the part remaining might be considered 'clear proceeds' under the Constitution, and go to the public school fund in obedience to, and full satisfaction of, its mandate."

We have concluded that the Supreme Court of Missouri, based on previous case law, has upheld some deductions from fines and forfeitures prior to their being transferred to the county treasury school fund. It is clear however that no deductions may be made from such fines or forfeitures unless there is express statutory authority for such deductions.

This office held in Opinion No. 80, 1970, (copy enclosed) that the provisions of Section 56.310, RSMo, authorize the deduction of the specific fees for prosecuting attorneys in such section in determining the clear proceeds of bond forfeitures because such section provides a specific fee to be paid to the prosecuting attorney for his services in bond forfeiture proceedings. In this case we find no statutes providing for deductions to be made from bail forfeitures for the purpose of paying magistrate fees, sheriff's fees, or witnesses' fees and none have been cited to us. Notably, such charges are usually taxed as costs to be levied above and beyond the amount of any forfeiture in a criminal proceeding.

Therefore, in the absence of any express authorization for the deduction of such costs we conclude that such costs may not be deducted from the amount of bail forfeitures.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 80
8-7-70, Gilmore

August 1, 1972

OPINION LETTER NO. 195
Answer by Letter - Dean

Honorable William J. Esely
Missouri Senate
1414 West Main
Bethany, Missouri 64424



Dear Senator Esely:

Your opinion request of June 22, 1972 asks whether an attorney who is presently serving as a deputy juvenile officer in a multi-county judicial circuit (an appointed position) can also serve as city attorney of a fourth class city (also an appointed position); the city being located within a county of the same judicial circuit in which he serves as deputy juvenile officer?

It is our opinion that the attorney in question cannot hold both positions.

Enclosed herein please find a copy of Opinion Letter No. 219 issued March 30, 1971 and Opinion No. 141 issued in 1970. Our holding that the offices of city attorney and juvenile officer are incompatible is based on the reasoning stated in the two opinions enclosed.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. Ltr. No. 219
3-30-71, Lance

Op. No. 141
5-7-70, Lance



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

June 23, 1972

OPINION LETTER NO. 196

Dr. Arthur L. Mallory
Commissioner of Education
State Board of Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

This is in answer to your request for our review and certification of the Missouri State Board of Education's Application for Grant to Strengthen a State Department of Education under the Elementary and Secondary Education Act of 1965, Title V, Section 503, Public Law 89-10, as amended, for fiscal year 1973.

It is the opinion of this office that the Missouri State Board of Education is the agency in this State primarily responsible for State supervision of public elementary and secondary schools and is the "State Educational Agency" as defined in Section 801(k) of Title VIII of Public Law 89-10, as amended; and that the State Board of Education has the authority under State law to submit an application for a grant pursuant to Section 503 of Title V, Public Law 89-10. See Sections 161.092 and 178.430, RSMo 1969.

In conjunction with this Letter Opinion which constitutes our official certification of the application, we have completed the required certification form.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth", is written over the typed name.

JOHN C. DANFORTH
Attorney General

DOGS:
ANIMALS:
COUNTY OPTION DOG TAX:

The county dog license fund established under the local option dog tax law (Sections 273.040 to 273.180, RSMo) shall be used only for

the purpose of compensating persons who have suffered loss or damage through injury or killing by dogs of any livestock or poultry owned by them and located in said county at the time of such injury or killing.

OPINION NO. 197

July 21, 1972

Honorable Howard Garrett
Representative, District 131
1540 Westvale
Festus, Missouri 63028



Dear Representative Garrett:

This is in response to your request for an opinion from the office of the Attorney General with respect to the following inquiry:

"Can the funds referred to in 273.070, paragraph 3., be used for any purpose other than 'compensating persons...'"

The above statute, Section 273.070(3), RSMo 1969, provides as follows:

"The treasurer of the county shall set any and all sums so received apart in a separate fund to be known as a 'County Dog License Fund', and such fund shall be used only for the purpose of compensating persons who have suffered loss or damage through injury or killing by dogs of any livestock or poultry owned by them and located in said county at the time of such injury or killing, in an amount not to exceed the market value thereof at the time of such injury or killing. The county court of each county in this state is authorized to expend and draw county warrants against such fund only as herein provided; provided, that sections 273.040 to 273.180 shall not be construed to prevent suits at law for damages caused to livestock or poultry by dogs." (Emphasis added)

Honorable Howard Garrett

The Missouri local option dog tax law, as provided in Sections 273.040 to 273.180, RSMo, can only become operative after a valid county election in which majority of votes cast upon the question are in favor of the license tax on dogs and proper notice thereof by publication is given by the county court. See Section 273.170, RSMo 1969.

The purpose of this local option law is to provide a fund for the compensation of persons who have suffered loss or damage through injury or killing by dogs of any livestock or poultry owned by them and located in said county at the time of such injury or killing. This intent is set forth in Section 273.070(3) as emphasized above. Where the language of a statute is clear and not ambiguous, a court has no right to read into it an intent which is contrary to the legislative intent made evident by the phraseology employed. State ex inf. Rice ex rel. Allman v. Hawk, 228 S.W.2d 785 (Mo. 1950). It is fundamental that where a statute is plain and unambiguous, there is no room for construction. Cummins v. Kansas City Public Service Co., 66 S.W.2d 920 (Mo. banc 1933), where the language of a statute is plain and unambiguous, it must not be construed but must be given effect as written. St. Louis Amusement Co. v. St. Louis County, 147 S.W.2d 667 (Mo. 1941).

CONCLUSION

It is, therefore, the opinion of this office that the county dog license fund established under the local option dog tax law (Sections 273.040 to 273.180, RSMo) shall be used only for the purpose of compensating persons who have suffered loss or damage through injury or killing by dogs of any livestock or poultry owned by them and located in said county at the time of such injury or killing.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard S. Paden.

Yours very truly,



JOHN C. DANFORTH
Attorney General

TAXATION:
METROPOLITAN DISTRICT:
ST. LOUIS METROPOLITAN
DISTRICT:

The Board of the Metropolitan Zoological Park and Museum District of the City of St. Louis and St. Louis County is not authorized to fix a permanent levy rate under Section 184.350, RSMo, for each of the three subdistricts of such District but is authorized to fix an annual rate varying as may be necessary within the prescribed statutory limits. Such District Board has no regulatory control over subdistrict funds and has no supervisory control over the subdistrict officers, employees or operations. Such Board must honor proper subdistrict vouchers.

OPINION NO. 198

July 21, 1972

Honorable Lawrence J. Lee
Senator, District 3
506 Olive, Room 802
St. Louis, Missouri 63101



Dear Senator Lee:

This opinion is in response to your request which asks several questions relating to the provisions of Sections 184.350, RSMo et seq., with respect to the Metropolitan Zoological Park and Museum District and the respective subdistricts established in the City of St. Louis and St. Louis County pursuant to said sections.

Your first question asks whether the District Board has the authority to set the tax rate only once for each of the three subdistricts or whether the Board is to set the rates annually. In this respect we note that subsections 2 and 3 of Section 184.350, RSMo, as initially introduced in House Bill No. 23, Third Extra Session, 75th General Assembly, provided for a fixed levy. The subsections, as passed, provide for subdistrict rates to be "established by the board" and "not in excess" of the prescribed statutory maximum rates.

It is axiomatic that the overriding object of all statutory construction is to ascertain and give effect to legislative intention. Gaddy v. State Board of Registration for the Healing Arts, 397 S.W.2d 347 (Mo.App. 1965). And, the law favors constructions which harmonize with reason and which tend to avoid unjust, absurd, or unreasonable results. State ex rel. Stern Brothers & Co. v. Stilley, 337 S.W.2d 934 (Mo. 1960). A logical and reasonable result must be presumed.

While, in this instance, there would have been no room for argument if the legislature had included the word "annually" after

Honorable Lawrence J. Lee

the words "as established by the board," it is our view that the failure to do so does not require an interpretation which would ascribe an absurd intent to the legislature. As we have noted, the bill as introduced contained a fixed and unalterable rate. In our view, the language inserted in the perfected version and as finally passed was intended to authorize the Board to levy rates within such maximums prescribed on an annual basis. The levying of such annual rates by political subdivisions is common practice.

The provision in Section 184.350 that the tax rate as established by the District Board should be deemed in effect as of the first day of the year following the year of the election establishing the district was for the purpose of providing that the tax could not be levied the year of the establishment of the district but that the tax could be levied for the first time in the year following the establishment of the district.

We thus conclude in answer to your first question that the District Board is empowered to set and change the tax rate for each subdistrict annually under Section 184.350 within the maximums prescribed.

Your second question asks whether the District Board has the power to regulate, administer, expend or supervise the moneys collected and deposited to the subdistricts' accounts. We believe that the first sentence in Section 184.362, quoted below, giving the subdistrict commissions exclusive control of their funds answers your question and that the subdistricts thus have exclusive control of the expenditure of their funds except for the funds allocated to the cost of operating the District under Section 184.356, RSMo.

Your third question asks whether the District Board has any authority over the operation, administration, officers, and employees of the respective subdistricts.

It is our view that the legislature made the subdistricts autonomous with respect to their operations, administration, officers, and employees. We base this view on the provisions of Sections 184.360 and 184.362, RSMo.

Section 184.360 provides:

"1. Each respective subdistrict is hereby empowered to own, hold, control, lease, acquire by donation, gift or bequest, purchase, contract, lease, sell, any and all rights in land, buildings, improvements, furnishings, displays, exhibits and programs and any and all other

Honorable Lawrence J. Lee

real, personal or mixed property for the purposes of the said subdistrict.

"2. All buildings, property and facilities of existing publicly owned and operated zoological parks and museums established under the constitution or laws of this state or museum of science and natural history upon which a majority of the voters of both the city and county have passed upon as provided for in section 184.350 shall become the property of and vest in the respective and applicable subdistrict on the date such subdistrict shall be established as provided in section 184.350. Any obligations, duties, rights, privileges of whatever description pertaining to or relating to the maintenance, operation, construction, design or affairs of any such existing zoological park or museum shall be assumed by the respective subdistricts."

Section 184.362 provides in part:

". . . Said commission [of the subdistricts] shall have exclusive control of the expenditures of all moneys collected by the district to the credit of the subdistrict's fund and of the construction and maintenance of any subdistrict, buildings built or maintained in whole or in part with moneys of said fund and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased or set apart for the purposes of the subdistrict under the authority conferred in this law. Said commission shall have the power to appoint a director and necessary assistants, to fix their compensation and shall also have power to remove such appointees. All employees, appointees and officers of such publicly owned and operated museums and zoological parks shall on the establishment of a subdistrict related thereto become employees of the subdistrict and such appointees' and employees' seniority, pension, salaries, wages and fringe benefits shall be equal to or better than that existing at the time of the establishment of the subdistrict insofar as may be possible. . . ." (Bracketed matter added)

Honorable Lawrence J. Lee

Although the District may render common services under Section 184.356, RSMo, receive reports from such subdistricts under Section 184.362, RSMo, and furnish combined annual subdistrict reports to the chief executive officers of the city and county under Section 184.380, RSMo, these provisions do not, in our view, impair the express powers otherwise vested in such subdistricts.

Your fourth question asks whether the District Board must honor subdistrict authenticated vouchers or whether the Board may question the vouchers if they are in proper form.

Our answer to this question is found in Section 184.356, RSMo, which provides in part:

" . . . All funds collected for a subdistrict shall be kept separate and apart from any other funds and shall be drawn upon by the proper officers of the subdistrict upon submission of properly authenticated vouchers. . . ."

Our view with respect to these provisions relative to subdistrict vouchers is that the District Board must honor proper vouchers having no patent irregularity. We assume that the vouchers submitted by the subdistricts are for lawful purposes.

CONCLUSION

It is the opinion of this office that the Board of the Metropolitan Zoological Park and Museum District of the City of St. Louis and St. Louis County is not authorized to fix a permanent levy rate under Section 184.350, RSMo, for each of the three subdistricts of such District but is authorized to fix an annual rate varying as may be necessary within the prescribed statutory limits. Such District Board has no regulatory control over subdistrict funds and has no supervisory control over the subdistrict officers, employees or operations. Such Board must honor proper subdistrict vouchers.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach. .

Yours very truly,



JOHN C. DANFORTH
Attorney General



OFFICE OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

August 2, 1972

LETTER OPINION NO. 200

Dr. Arthur L. Mallory
Commissioner of Education
State Board of Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Dr. Mallory:

Pursuant to your request of June 23, 1972, we have reviewed, for the purpose of certification, the amendments approved by the State Board of Education on June 23, 1972, to the Missouri State Plan under Title III-A of the National Defense Education Act of 1958, Public Law 85-864 (1958), as amended.

It is the opinion of this office that this amendment to the State Plan does not alter this office's previous certification of the State Plan and that the State Plan as amended can, with respect to the use of federal funds, be carried out in the State of Missouri.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth", is written over the typed name.

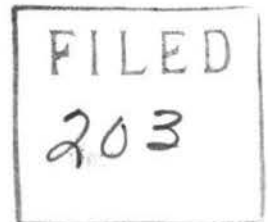
JOHN C. DANFORTH
Attorney General

HATCH ACT: The employees of a not-for-profit
STATE EMPLOYEES: corporation organized for the sole
purpose of promoting some functions
of comprehensive health planning and to receive, via contract,
federal funds which have been provided the State of Missouri by
reason of 42 U.S.C.A. §246(a), are precluded from campaigning
for elective office by the provisions of the Hatch Act for the
reason that the agency concerned qualifies as "the executive
branch of a State, municipality, or other political subdivision
of a State, or an agency or department thereof" the employees
of which are prohibited from actively participating in a political
campaign by Title 5 U.S.C.A. §1052(a).

OPINION NO. 203

December 4, 1972

Mr. Gene Sally, Director
Missouri Department of Community Affairs
505 Missouri Boulevard
Jefferson City, Missouri 65101



Dear Mr. Sally:

This opinion is in response to your request for an official
opinion from the Office of the Attorney General regarding the
following question of law:

"Are the employees of a not-for-profit corporation organized to promote some functions of comprehensive health planning, but not established as a Section 314(b), PL. 89-749 (as amended) agency, covered by the provision of the Hatch Act, or any other federal rules or regulations, that would preclude them from being a partisan candidate in a legislative contest, said agency receiving contract funds from the Missouri Department of Community Affairs, Office of Comprehensive Health Planning which are entirely federal grant funds given to the Department by the U. S. Department of Health, Education and Welfare?"

Your request involves the applicability of a federal law, the Hatch Act, to a particular set of factual circumstances. In order that this office might address the question, you have provided us with the facts which prompted your request. The applicability of the Hatch Act to these facts will be determinative

Mr. Gene Sally

of your opinion request. Within the Missouri Department of Community Affairs, there exists a division called the Office of Comprehensive Health Planning. The Office of Comprehensive Health Planning has executed a contract with Mid-Missouri Area-wide CHP Agency, Inc., whereby the latter has agreed:

"[T]o provide the Office of Comprehensive Health Planning with regional information on demographic, socioeconomic, ethnic and health characteristics; inventories of health resources; and identification of major consumer and provider groups in the region to develop plans for home health care services, emergency medical services, planning for capital cost financing of medical facilities, and 'review and comment' on projects per request of the Office of Comprehensive Health Planning. . . ."

These services are to be performed in an area which has been designated as Mid-Missouri Regional Planning Commission Region. Mid-Missouri Areawide CHP Agency, Inc. has been incorporated as a not-for-profit corporation with a certificate of incorporation filed with the Missouri Secretary of State. It is implicit in the information provided that Mid-Missouri was incorporated solely for the purposes enumerated above. Payments made by the Office of Comprehensive Health Planning to Mid-Missouri Areawide CHP Agency, Inc. are largely provided by federal grants made to the Missouri Department of Community Affairs to be used for health purposes. The authority by which these federal grants have been made available to the Office of Comprehensive Health Planning is 42 U.S.C.A. §246(a). The federal government, in the person of the Surgeon General, may also grant federal funds to certain qualified local areawide CHP agencies with the approval of the statewide agency. The authority for such grants is 42 U.S.C.A. §246(b). The Mid-Missouri Areawide CHP Agency, Inc. has not as yet been designated under the above subsection to receive direct grants of funds from the federal government. Areawide CHP agencies designated as appropriate to receive such federal funds directly by 42 U.S.C.A. §246(b) can be either public or not-for-profit private organizations. It is anticipated that the Mid-Missouri Areawide CHP Agency, Inc. will, in the future, be designated as an areawide comprehensive health planning agency for purposes of the above subsection.

In April of 1972, an employee of Mid-Missouri Areawide CHP Agency, Inc. filed for the elective office. Before filing, the employee notified the Office of Comprehensive Health Planning and the Mid-Missouri Areawide CHP Agency, Inc. of his intentions to do so. This individual was employed by the Mid-Missouri Areawide CHP

Mr. Gene Sally

Agency on a one-half time basis. He did not resign his position upon filing for public office. He did, however, resign at a later date.

The question presented under the above facts is whether, by campaigning for elective office, an employee of Mid-Missouri Area-wide CHP Agency, Inc. is in violation of the Hatch Act. The Hatch Act can be found in Title 5, Chapter 15 of the United States Code. Title 5, Section 1502, U.S.C.A. provides that:

"(a) A State or local officer or employee may not--

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;

(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or

(3) take an active part in political management or in political campaigns."

Title 5, Section 1501 defines "State or local agency" as "the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof." That section defines "State or local officer or employee" as:

"[A]n individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, . . ."

The employee of Mid-Missouri Areawide CHP Agency, Inc. under question has filed for an elective office. As a candidate for office this individual is taking an active part in a political campaign as prohibited by Chapter 5, U.S.C.A., Section 1502(a) (3). Northern Virginia Regional Park Authority v. United States Civil Service Commission, 437 F.2d 1346 (4th Cir. 1971), cert. den. 403 U.S. 936; In re Higginbotham, 340 F.2d 165 (3rd Cir. 1965), cert. den. 382 U.S. 853.

The employee concerned contributes approximately one-half of his time to his employment by Mid-Missouri Areawide CHP Agency, Inc. We believe this qualifies as "principal employment" as

Mr. Gene Sally

required by the Hatch Act definition of "State or local officer or employee." The case of Palmer v. United States Civil Service Commission, 297 F.2d 450 (7th Cir. 1962), cert. den. 369 U.S. 849, involved the Director of the Illinois Conservation Department. He was also a precinct committeeman and chairman of his county party committee. The Court of Appeals for the Seventh Circuit found that his activities taking up at least fifty percent of his time in regard to the state conservation program, which used federal funds, was in violation of the Hatch Act in consideration of his political involvements. Id. at 454. In Smyth v. United States Civil Service Commission, 291 F.Supp. 568 (E.D.Wisc. 1968), the court held that part-time employment in a federally financed public job could qualify as principal employment for purposes of the Hatch Act definition. That case further held that the burden of going forward with the evidence was on petitioner to show that his principal employment was other than that which would have been in violation of the Hatch Act. Id. at 573. We believe that, absent a showing to the contrary by the individual involved, the principal employment requirement of Title 5, Section 1501(4) is met in the case as presented wherein an individual works half-time for Mid-Missouri Areawide CHP Agency, Inc.

It remains to be determined whether the individual involved is an employee of a "State or local agency", i.e., is the Mid-Missouri Areawide CHP Agency, Inc., "the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof." Although Mid-Missouri has been registered with the Secretary of State as a not-for-profit corporation, we have nevertheless concluded that it qualifies as a "State or local agency" for purposes of the Hatch Act.

Federal law, rather than state, should be determinative of whether or not a particular entity is a "State or local agency" within the meaning of the Hatch Act. NLRB v. Natural Gas Utility District, 402 U.S. 600, 602-603, 29 L.Ed.2d 206, 208, 91 S.Ct. 1746 (1971). Were the question before us one involving civil rights, federal case law would clearly indicate that Mid-Missouri should be considered as the state's alter ego. In Poindexter v. Louisiana Financial Assistance Commission, 275 F.Supp. 833 (E.D. La. 1967), aff'd 389 U.S. 571, 19 L.Ed.2d 780, 88 S.Ct. 693 (1968), the state's grant in aid program to parents desiring to send their children to private segregated schools was held unconstitutional "state action".

"The United States Constitution does not permit the state to perform acts indirectly through private persons which it is forbidden to do directly. . . .

* * *

Mr. Gene Sally

"The payment of public funds in any amount through a state commission under authority of a state law is undeniably state action. . . ." Id. at 835, 854.

In Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. den. 376 U.S. 938, 11 L.Ed.2d 659, 84 S.Ct. 793 (1964), racial discrimination by nonprofit privately owned hospitals was held to be "state action" primarily because the hospitals had applied for and received federal funds for physical plant expansion.

"In our view the initial question is, rather, whether the state or the federal government, or both, have become so involved in the conduct of these otherwise private bodies that their activities are also the activities of these governments and performed under their aegis without the private body necessarily becoming either their instrumentality or their agent in a strict sense. . . .

* * *

"Here the most significant contacts compel the conclusion that the necessary 'degree of state [in the broad sense, including federal] participation and involvement' is present as a result of the participation by the defendants in the Hill-Burton program. The massive use of public funds and extensive state-federal sharing in the common plan are all relevant factors. We deal here with the appropriation of millions of dollars of public monies pursuant to comprehensive governmental plans. . . .

"[W]e find it significant here that the defendant hospitals operate as integral parts of comprehensive joint or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health. . . ." Id. at 966-967.

The corporate purposes of Mid-Missouri, as stated in its Articles of Incorporation is:

Mr. Gene Sally

"To effect Comprehensive health planning through cooperative involvement of consumers and providers in the Mid-Missouri area and contribute to the overall Comprehensive Health Planning in the State of Missouri; by relating to state agencies."

Pursuant to Article I of its contract with the Department of Community Affairs, Mid-Missouri is obligated:

". . .to provide the Office of Comprehensive Health Planning with regional information on demographic, socioeconomic, ethnic and health characteristics; inventories of health resources; and identification of major consumer and provider groups in the region to develop plans for home health care services, emergency medical services, planning for capital cost financing of medical facilities, and 'review and comment' on projects per request of the Office of Comprehensive Health Planning. This information and plans are a major contribution to the statewide comprehensive health planning process and the Missouri CHP Plan."

Since the great majority of Mid-Missouri's operating capital comes from funds paid to it under the contract mentioned immediately above, and considering the nature of this agency's activities, we conclude the corporation should be regarded as a "State or local agency" for Hatch Act purposes.

"That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." Evans v. Newton, 382 U.S. 296, 15 L.Ed.2d 373, 377, 86 S.Ct. 486 (1966).

In relation to the meaning attached to the term "political subdivision" by federal law, we refer you to language in the opinion of Commission of Internal Revenue v. Shamberger's Estate, 144 F.2d 998, 1004-1005 (2nd Cir. 1944), cert. den. 89 L.Ed. 631, 323 U.S. 792 (1945):

"The term 'political subdivision' is broad and comprehensive and denotes any division of the State made by the proper authorities

Mr. Gene Sally

thereof, acting within their constitutional powers, for the purpose of carrying out a portion of those functions of the State which by long usage and the inherent necessities of government have always been regarded as public. The words "political" and "public" are synonymous in this connection. . . . It is not necessary that such legally constituted "division" should exercise all the functions of the State of this character. It is sufficient if it be authorized to exercise a portion of them. * * *

* * *

"Here the activities, even though some of them might have been exercised by private corporations under appropriate legislation, are exercised for a public purpose by an agency [Port of New York Authority] set up by the states and given many public powers, though not of taxation or control through the suffrages of citizens. It minimizes its public and political character to treat such an agency as a private corporation merely because of the lack of taxing power which is only one of the attributes of sovereignty."

We believe that the conclusion that Mid-Missouri qualifies as a "State or local agency" for Hatch Act purposes, as reached by an interpretation of federal law, is supported by certain laws of this state as regards the meaning of the term "political subdivision", as such term is used in Title 5, Section 1501 U.S.C.A. Section 251.020(6), RSMo 1969, defines political subdivision as "regional or other planning commissions and any other local public body. . . exercising governmental functions." We believe that advisory functions relating to the health and welfare of the general public qualify as "governmental functions" as that term is above defined in those Missouri cases dealing with the tort immunity of government where governmental functions have been exercised and have resulted in injury. See Auslander v. City of St. Louis, 56 S.W.2d 778, 780 (Mo. Banc 1932); Kansas City, Mo. v. J. I. Case Threshing Mach. Co., 87 S.W.2d 195, 202-203 (Mo. 1935). This conclusion is compatible with our earlier opinion that local law enforcement assistance councils (which are organized on a regional planning area basis as are areawide CHP agencies) qualify as political subdivisions under Section 251.020(6), RSMo 1969. Opinion of the Attorney General, No. 431, Culver, 1969.

Mr. Gene Sally

We believe that our conclusion in this opinion accurately comports with the purposes of the Hatch Act as those purposes were described by the Supreme Court of the United States in upholding the constitutionality of the Hatch Act.

"The conclusion of the Court, that there was no constitutional bar to regulation of such financial contributions of public servants as distinguished from the exercise of political privileges such as the ballot, has found acceptance in the subsequent practice of Congress and the growth of the principle of required political neutrality for classified public servants as a sound element for efficiency. The conviction that an actively partisan governmental personnel threatens good administration has deepened since Ex parte Curtis. Congress recognizes danger to the service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections.

* * *

"The argument that political neutrality is not indispensable to a merit system for federal employees may be accepted. But because it is not indispensable does not mean that it is not desirable or permissible. Modern American politics involves organized political parties. Many classifications of Government employees have been accustomed to work in politics--national, state and local--as a matter of principle or to assure their tenure. Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system. It may have considered that parties would be more truly devoted to the public welfare if public servants were not over active politically." United Public Workers v. Mitchell, 330 U.S. 75, 97-100, 91 L.Ed. 754, 771-773, 67 S.Ct. 556 (1947) (Emphasis added).

And in a companion case:

"While the United States is not concerned and has no power to regulate local political activities as such of state officials, it does

Mr. Gene Sally

have power to fix the terms upon which its money allotments to [the] state shall be disbursed.

". . . The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. . . ." Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 143, 91 L.Ed. 794, 806, 67 S.Ct. 544 (1947).

CONCLUSION

Therefore, it is the opinion of this office that the employees of a not-for-profit corporation organized for the sole purpose of promoting some functions of comprehensive health planning and to receive, via contract, federal funds which have been provided the State of Missouri by reason of 42 U.S.C.A. §246(a), are precluded from campaigning for elective office by the provisions of the Hatch Act for the reason that the agency concerned qualifies as "the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof" the employees of which are prohibited from actively participating in a political campaign by Title 5, Section 1502 (a), U.S.C.A.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Michael L. Boicourt.

Very truly yours,



JOHN C. DANFORTH
Attorney General

COUNTIES:
COUNTY CHARTER:
COUNTY CLASSIFICATION:

When a second class county which has adopted a charter form of government becomes a first class county it continues as a charter county.

OPINION NO. 205

August 16, 1972

Honorable Howard M. Garrett
Representative, District 131
1540 Westvale Drive
Festus, Missouri 63028



Dear Representative Garrett:

This is in response to your request for an opinion from this office as follows:

"If a county of the second class adopts a charter, then passes the \$300,000,000 limit of assessed valuation and becomes a county of the first class, does its status as a charter county carry over automatically? Would the matter have to be resolved by an election?"

We have been unable to find any court decision in this state passing upon the question you have submitted.

Article VI, Section 8, Constitution of Missouri, provides that provisions shall be made by general law for the organization and classification of counties into classes which shall not exceed four.

The classification of counties is governed by Chapter 48, RSMo.

Section 48.020, RSMo, provides that all counties of this state are classified for the purpose of establishing organization and powers and in accordance with the provision of Article VI, Section 8, Constitution of Missouri, into four classes. It provides that all counties now having or which may hereafter have an assessed valuation of three hundred million dollars and over shall be in the first class.

Section 48.030, RSMo, provides that no county shall move from a lower class to a higher class or from a higher class to a lower class until the assessed valuation of the county is such as to place it in the other class for five consecutive years.

Honorable Howard M. Garrett

It is our opinion that when a county has an assessed valuation of three hundred million dollars or more for five consecutive years it automatically becomes a class one county. *Chaffin v. County of Christian*, 359 S.W.2d 730 (Mo. banc 1962).

Article VI, Section 18(a), Constitution of Missouri, provides any county having more than eighty-five thousand inhabitants may adopt a charter for its own government. This is true without regard to the county classification.

You inquire what effect, if any, a change in classification of a county has on the form of government the county has adopted.

It is our opinion that a change of classification of a county from a second class county to a first class county does not affect a form of government which the county has adopted. It is our view that any county that has a population in excess of eighty-five thousand inhabitants as provided in Article VI, Section 18(a), *supra*, may adopt a charter form of government without regard to the classification of the county, and when the classification of the county is changed, the form of government it has adopted continues automatically.

CONCLUSION

It is the opinion of this office that when a second class county which has adopted a charter form of government becomes a first class county it continues as a charter county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH
Attorney General

July 24, 1972

OPINION LETTER NO. 206
Answer by letter-Klaffenbach



Mr. John T. Wiley, Chairman
Board of Election Commissioners
City of St. Louis
208 South 12th Boulevard
St. Louis, Missouri 63102

Dear Mr. Wiley:

This letter is in response to your opinion request in which you ask:

"Is there any way in which the St. Louis Board of Election Commissioners may register to vote persons confined in a State Hospital, not located in the city of St. Louis, who claim residency in the city of St. Louis."

Although we do not intend to go into the question as to the eligibility to vote of all patients in state mental hospitals, we note that the Constitution of Missouri, in pertinent part, Article VIII, Section 2, bars idiots and persons who have a guardian of his or her estate or person from voting. Clearly, however, not all such patients are "idiots" or persons under legal guardianship, and subsection 3 of Section 202.847, RSMo 1969, subject to certain restrictions, retains the right of such a patient to vote "unless he has been adjudicated incompetent and has not been restored to legal capacity."

In our Opinions No. 112, dated March 22, 1972, to Frappier and No. 206, dated May 29, 1967, to Almond, copies enclosed, dealing respectively with St. Louis County registration and Jefferson County registration, we held that, because of the language in the statutes involved expressly limiting registration to such county limits, registration could not be conducted outside such counties.

Mr. John T. Wiley

In this instance, Section 118.240, RSMo Supp. 1971, respecting the registration of voters in the City of St. Louis contains no such express restriction. However, we have reviewed the opinion of the City Counselor of the City of St. Louis dated April 24, 1972, to Baumann and agree with the conclusion that, as there is no express authority to conduct registration outside such city, the St. Louis Board of Election Commissioners does not have authority to conduct registration of voters at places situated outside the city.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 112
3-22-72, Frappier

Op. No. 206
5-29-67, Almond

LIBRARIES:
CITY LIBRARIES:
COUNTY LIBRARIES:
TAXATION (CITIES,
TOWNS & VILLAGES):

A county library district which is a member of a regional library retains the power to levy taxes. When a city which contains a municipal library district annexes territory that is within a county

library district, the annexed territory remains in the county library district and is subject to taxation by the county library district and not to taxation by the city library district.

OPINION NO. 207

November 1, 1972

Honorable Marvin E. Proffer
State Representative
Route 1
Jackson, Missouri 63755



Dear Representative Proffer:

This is in response to your request for an opinion on the following question:

"Does the wording in Section 182.480 RSMo 1969, et seq. which makes reference to 'county library districts' include 'regional libraries' such as the Riverside Regional Library in Jackson, Missouri?"

A "regional library" is a term used to describe an organization composed of public libraries. Each member library of the regional library retains its own separate corporate identity. A regional library does not tax; rather, each member public library levies its own tax. This office has been advised by the State Librarian that there is a Cape Girardeau county library district and that the district is a member of the Riverside Regional Library.

Section 182.480, RSMo 1969, provides in part:

". . . after October 13, 1965, any annexation by a city having within its boundaries a municipal library district shall not extend the boundaries of the municipal library district, and any annexed areas shall remain in the county library district, and the taxable property in any such annexed areas shall only be subject to taxation by the county library district and shall not be subject to taxation by

Honorable Marvin E. Proffer

the municipal library district; except, that in any county not having a county library any such annexation shall likewise extend the boundaries of any existing municipal library district."

Therefore, under the provisions of Section 182.480, quoted above, territory annexed by the city of Jackson will continue to remain in the Cape Girardeau county library district rather than the city of Jackson municipal library district. The annexed territory will continue to be subject to taxation by the Cape Girardeau county library district and not the city of Jackson library district.

CONCLUSION

It is, therefore, the opinion of this office that a county library district which is a member of a regional library retains the power to levy taxes. When a city which contains a municipal library district annexes territory that is within a county library district, the annexed territory remains in the county library district and is subject to taxation by the county library district and not to taxation by the city library district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Yours very truly,



JOHN C. DANFORTH
Attorney General

ELECTIONS:

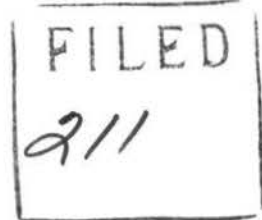
CORRUPT PRACTICES:

Section 129.300, RSMo 1969, which requires the identification of persons publishing, circulating or distributing certain printed matter relative to the candidacy of any person seeking nomination or election to any public office applies to pamphlets, circulars, handbills and similar printed matter but does not apply to yard signs.

OPINION NO. 211

August 16, 1972

Honorable William Raisch
State Representative
9904 Vassel Drive
Affton, Missouri 63123



Dear Representative Raisch:

This opinion is in answer to your opinion request in which you ask:

"Does this regulation [Section 129.300, RSMo 1969] include yard signs which are posted in ground on stick or placed in other manners or areas (not in violation of any law where they may be posted) which signs state 'Elect, or Re Elect, or Vote For, Candidate, Party, name of office seeking.'"

Section 129.300 to which you refer states:

"It shall hereafter be unlawful for any person or group of persons, or any firm, organization, association, league or other body or any members thereof to publish, circulate or distribute any pamphlet, circular, handbill or other printed matter relative to the candidacy of any person or persons seeking nomination or election to any public office unless the same shall bear thereon in plain type the name and address of the person or persons, or the names and addresses of the officers of any firm, organization, association, league or other body, causing such matter to be published and distributed, and in the event that two or more persons join in causing said matter to be published and distributed then the names of each of such persons shall be imprinted thereon in plain

Honorable William Raisch

type; provided, that if more than ten persons join in publishing and distributing such matter, then it will be a sufficient compliance with this section if the names of ten such persons shall be imprinted thereon in plain type as herein provided."

Section 129.300 is penal in nature, a violation of which is punishable by imprisonment so it must be strictly construed. If there is any doubt about its application to a particular set of facts, the doubt must be resolved in the negative. State v. Hodge, 8 S.W.2d 881 (Mo. 1928); State v. Carter, 319 S.W.2d 596 (Mo. 1958).

Further, in this instance, in determining the intent of the legislature and the purpose for which the statute was enacted, the doctrine of ejusdem generis should be applied. This rule of construction is stated in Hammett v. Kansas City, 173 S.W.2d 70, 75 (Mo. 1943), as follows:

" . . . 'The ejusdem generis rule is that where a statute contains general words only, such general words are to receive a general construction, but, where it enumerates particular classes or things, followed by general words, the general words so used will be applicable only to things of the same general character as those which are specified.'"

Under these rules of construction, it is our view that this statute applies only to pamphlets, circulars, handbills, and similar printed matter that are distributed and not to such yard signs.

CONCLUSION

It is the opinion of this office that Section 129.300, RSMo 1969, which requires the identification of persons publishing, circulating or distributing certain printed matter relative to the candidacy of any person seeking nomination or election to any public office applies to pamphlets, circulars, handbills and similar printed matter but does not apply to yard signs.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH
Attorney General

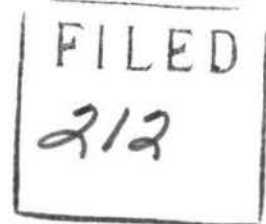
CRIMINAL LAW:
CRIMINAL PROCEDURE:
PROBATION & PAROLE:

The cumulative period of both parole and probation of a person convicted of a misdemeanor, granted pursuant to Sections 549.071 and 549.101, RSMo, may not exceed the two year maximum set out in Section 549.071.

OPINION NO. 212

August 21, 1972

Mr. Walter G. Sartorius, Chairman
Board of Probation and Parole
Post Office Box 267
Jefferson City, Missouri 65101



Dear Mr. Sartorius:

This is in reply to your letter requesting an opinion of this office concerning a construction of Section 549.071(1) and (2) and Section 549.101(2). In that request you ask:

"Does the maximum period of probation supervision as outlined in 549.071, Section 1, affect the period that a Judge may place an individual on parole as described in 549.071, Section 2, or 549.101, Section 2?"

In your opinion request, you present the hypothetical case where a person has been given one year probation on a misdemeanor charge, is then subsequently revoked and confined in the county jail, and after a period of incarceration is placed on judicial parole. Your question is whether the period of time for the probation combined with the subsequent parole may extend beyond the maximum two year period as set out in Section 549.071.

The statutes in controversy follow:

Section 549.071:

"1. When any person of previous good character is convicted of any crime and commitment to the state department of corrections or other confinement or fine is assessed as the punishment therefor, the court before whom the conviction was had, if satisfied that the defendant, if permitted to go at large, would not again violate the law, may in its discretion, by order

Mr. Walter G. Sartorius

of record, suspend the imposition of sentence or may pronounce sentence and suspend the execution thereof and may also place the defendant on probation upon such conditions as the court sees fit to impose. The probation shall be for a specific term which shall be stipulated in the order of record. In the case of a felony offense no probation under this chapter shall be granted for a term of less than one year, and no probation shall be granted for a term of longer than five years. In the case of a misdemeanor offense no probation shall be granted for a term of longer than two years. The court may extend the term of probation, but no more than one extension of any probation may be ordered.

"2. The courts, subject to the restrictions herein provided, may, in their discretion, when satisfied that any person against whom a fine has been assessed or a jail sentence imposed, will, if permitted to go at large, not again violate the law, parole the defendant upon such conditions as the court sees fit to impose."

Section 549.101:

"1. The court granting probation or parole may at any time before order of discharge without notice to the defendant order his apprehension by the issuance of a warrant for his arrest and his appearance in court forthwith. Any probation or parole officer assigned to or serving the court or judge having jurisdiction may arrest such defendant without a warrant, or may deputize any other officer with power of arrest to do so by giving him a written statement setting forth that the defendant has, in the judgment of the probation officer, violated the conditions of his probation. The written statement delivered with the defendant by the arresting officer to the official in charge of a county jail or other place of detention shall be sufficient warrant for the detention of the defendant. After making an arrest the probation officer shall present to the detaining authorities a similar statement of the circumstances of violation. The court may in its discretion, with or without hearing, order the

Mr. Walter G. Sartorius

probation or parole revoked and direct that the sentence theretofore imposed be commenced and order execution thereof or in the event imposition of sentence was suspended the court may pronounce sentence and order execution thereof. The court may in its discretion order the continuance of the probation or parole upon such conditions as the court may prescribe. The court in its discretion may order the allowance in mitigation of the sentence credit for all or for part of the time the defendant was upon probation or parole.

"2. After probation or parole has been revoked, as provided in subsection 1, the court may in its discretion require the payment of all costs in the case and may grant a second probation or parole, but no more than two probations or paroles shall be granted the same person under the same judgment of conviction."

Our conclusion is compelled by a reading of the foregoing statutes and our construction of *Smith v. Carnes* (Mo. Sup. en banc 1972) 481 S.W.2d 242. In *Smith v. Carnes*, the Missouri Supreme Court held that the term of time which either "probation" or "parole" may take in misdemeanor cases can in no wise be longer than two years. In this regard, specific consideration should be given to footnote 2 of the court's opinion, which reads:

"The words 'probation' and 'parole' have been used interchangeably in the records of this case; however, petitioner's status has been consistently considered to be that of one on 'probation' under § 549.071. The difference between 'probation' and 'parole' is not significant in this case because when a person is placed on parole under § 549.071(2) the limitations applicable thereto are the same as the limitations applicable to one placed on probation under § 549.071(1)."¹

We read *Smith v. Carnes*, *supra*, and particularly footnote 2 to the court's opinion, to foreclose the extension of the period of parole set out in your hypothetical beyond a period of two years

¹For a discussion of the distinction between "probation" and "parole" see: *State v. Hicks* (Mo. Sup. 1964) 376 S.W.2d 160.

Mr. Walter G. Sartorius

for both probation before incarceration, and parole after incarceration. Thus, in the hypothetical you state, the period of probation prior to incarceration combined with the period of parole after incarceration for a misdemeanor may not exceed two years.

CONCLUSION

It is, therefore, the conclusion of this office that the cumulative period of both parole and probation of a person convicted of a misdemeanor, granted pursuant to Sections 549.071 and 549.101, RSMo, may not exceed the two year maximum set out in Section 549.071.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Kenneth M. Romines.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

MINING:
COUNTIES:
COUNTY COURT:
LAND RECLAMATION:

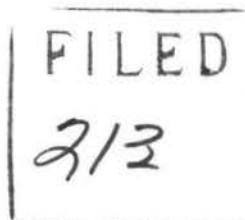
The county courts of third and fourth class counties who are conducting surface mining operations are not required to obtain permits under the provisions of

Sections 444.760 through 444.786, RSMo Supp. 1971, because they are not "operators" as defined by Section 444.765(5).

OPINION NO. 213

August 16, 1972

Mr. Robert Neuenschwander, Director
Land Reclamation Commission
Room B-36, State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Neuenschwander:

This is in reply to your request for an official opinion of this office concerning the question whether county courts of third and fourth class counties who are conducting surface mining operations are required to obtain permits under the provisions of Sections 444.760 through 444.786, RSMo Supp. 1971, "The Land Reclamation Act."

Section 444.770 provides that it is unlawful, as of January 1, 1972, for any "operator" to engage in surface mining without a permit from the Land Reclamation Commission defined in Section 444.765 as follows:

"(5) 'Operator' means any person, firm or corporation engaged in and controlling a surface mining operation;"

Since counties have not specifically been included in the definition of "operator," we must look to the rules of statutory construction to see if the legislature intended to require counties to obtain a permit and operate in conformance with state requirements, especially in light of Section 444.786 which makes it a misdemeanor to mine sand or gravel without a permit.

The applicable rule is found in 82 C.J.S., Statutes, Section 317, where it is stated, at pages 554-556:

"The government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the

Mr. Robert Neuenschwander

language of act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication.

"This general doctrine applies, or applies with special force, to statutes by which prerogatives, rights, titles, or interests of the government would be divested or diminished, or to statutes under which liabilities would be imposed on the government. . . ."

This rule is followed in Missouri. See, Hayes v. City of Kansas City, 362 Mo. 368, 241 S.W.2d 888,892 (1951); City of Poplar Bluff v. Knox, 410 S.W.2d 100, 104 (Spr.Ct.App. 1966); Paulus v. City of St. Louis, 446 S.W.2d 144 (St.L.Ct.App. 1969); and State ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960).

In particular, the Supreme Court in Hayes held that a city is not a person within the purview of a motor vehicle statute requiring every "person" to operate a motor vehicle in a certain manner. See also City of Webster Groves v. Smith, 340 Mo. 798, 102 S.W.2d 618, 619 (1937) where a city was held not to be a person; and Kein v. School Dist. of the City of Carthage, 42 Mo.App. 460, 464 (K.C. Ct.App. 1890) where a school district was held not to be a person.

Accordingly, we hold that a county is not an operator within the meaning of Sections 444.760 through 444.786.

CONCLUSION

It is the opinion of this office that the county courts of third and fourth class counties who are conducting surface mining operations are not required to obtain permits under the provisions of Sections 444.760 through 444.786, RSMo Supp. 1971, because they are not "operators" as defined by Section 444.765(5).

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH
Attorney General

SECRETARY OF STATE:
INITIATIVE AND REFERENDUM:
CONSTITUTIONAL LAW:

Secretary of State should refuse to issue his certificate when examination of initiative petition shows such petition does not contain a constitutional enactment clause, does not contain a title, does not contain sufficient signatures or if the petition contains more than one amended and revised article of the Constitution or one new article which contains more than one subject. He has no power to determine the validity or genuineness of signatures on such petitions.

OPINION NO. 216

July 25, 1972

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This is in answer to your recent request for an official opinion in which you ask the four following questions:

- "1. Does this office have the authority to determine that an initiative petition contains an enacting clause and to refuse to accept a petition for filing if it does not?
- "2. Does this office have the authority to determine that the proposed amendment contains more than one subject, and to refuse to file it if it does?
- "3. Does this office have the authority to determine that the petition does not contain a full and correct copy of the title, and to refuse to accept the petition for filing if it does not?
- "4. Does this office have the authority to determine that the petition contains sufficient signatures, and, if so, does evidence that the names are not valid and genuine give this office the authority to reject those signatures?"

Honorable James C. Kirkpatrick

Section 126.081, RSMo Supp. 1971, provides in part as follows:

"When any measure is filed with the secretary of state, to be referred to the people by the referendum petition, and when any measure is proposed by the initiative petition, the secretary of state shall examine the petitions to determine that they comply with the provisions of the Missouri constitution and with this chapter, and upon such determination shall issue his certificate setting forth, by congressional district, the number of signatures contained on petitions that comply with this chapter and he shall then forthwith transmit to the attorney general of the state a copy thereof, together with a copy of the measure subject to the initiative or referendum, and within ten days thereafter the attorney general shall provide and return to the secretary of state a ballot title for the measure. . . ." (Emphasis added)

It is clear from the provisions of such section that it is at present the duty of the Secretary of State to examine initiative petitions and if the contents of the petitions disclose that the petitions comply with the provisions of the Missouri Constitution and with Chapter 126, RSMo Supp. 1971, he is to issue his certificate and transmit to the Attorney General a copy of such certification together with a copy of the measure and the Attorney General is then to submit a ballot title for such measure. Conversely, it is clear from such section that if from an examination of the petitions the Secretary of State determines that such petitions do not comply with any provision of the Missouri Constitution or of Chapter 126, it is his duty to refuse to issue his certificate.

Section 50 of Article III, Constitution of Missouri, provides as follows:

"Initiative petitions proposing amendments to the Constitution shall be signed by eight per cent of the legal voters in each of two-thirds of the congressional districts in the state, and petitions proposing laws shall be signed by five per cent of such voters. Every such petition shall be filed with the secretary of state not less than four months

Honorable James C. Kirkpatrick

before the election and shall contain an enacting clause and the full text of the measure. Petitions for constitutional amendments shall not contain more than one amended and revised article of this Constitution, or one new article which shall not contain more than one subject and matters properly connected therewith, and the enacting clause thereof shall be 'Be it resolved by the people of the state of Missouri that the Constitution be amended:' Petitions for laws shall contain not more than one subject which shall be expressed clearly in the title, and the enacting clause thereof shall be 'Be it enacted by the people of the state of Missouri:'."

A determination that can and must be made by the Secretary from an examination of the petitions is whether the above requirements are met by the petition and if the Secretary of State determines that such constitutional requirements together with statutory requirements are met he must issue his certificate to that effect and if he determines that these requirements have not been met, it is his duty to refuse to issue such certificate.

Section 50, Article III of the Constitution provides that petitions for constitutional amendments shall contain an enacting clause providing "Be it resolved by the people of the state of Missouri that the Constitution be amended" and that petitions for laws shall contain an enacting clause "Be it enacted by the people of the state of Missouri."

In view of the fact that the Constitution makes specific requirements that petitions for constitutional amendments and petitions for laws shall contain the specified enacting clauses and since such fact can be determined by the Secretary of State from an examination of the petitions submitted, it is our view in answer to question No. 1 that you do have authority to determine whether or not an initiative petition contains the enacting clause required by the Constitution and if the petition does not contain the constitutionally required enacting clause, it is your duty under Section 126.180 to refuse to issue your certificate for such initiative petitions.

Section 50, Article III also provides that petitions for constitutional amendments shall not contain more than one amended and revised article of the Constitution or one new article which shall not contain more than one subject and matters properly connected therewith. Therefore, in answer to your second question, the Secretary of State does have authority to determine from an examination of the petition itself whether the petition contains

Honorable James C. Kirkpatrick

more than one amended and revised article or one new article containing more than one subject and if he determines that the proposed amendment does contain more than one amended and revised article or one new article containing more than one subject, it is his duty to refuse to issue his certificate for such petitions.

Section 126.041, RSMo Supp. 1971, provides in part as follows:

" . . . When circulated for signatures, each sheet for petitioners' signatures shall be attached to or contain a full and correct copy of the title and text of the measure so proposed by the initiative petition, and the petition shall be filed with the secretary of state, numbered in sequence for each congressional district. . . ."

It is apparent that Section 126.041 requires that each sheet for petitioners' signatures shall be attached to or contain a full and correct copy of the title of the measure proposed by the initiative petition. Therefore, in answer to your third question, it is clear that the Secretary of State has the authority to determine whether or not the sheets for the petitioners' signatures contain or are attached to a full and correct copy of the title of the measure proposed by the initiative petition. If an examination of the petition shows it contains no title, it is the duty of the Secretary of State to refuse to issue his certificate for such petition.

Section 50, Article III of the Constitution provides that an initiative petition proposing a constitutional amendment shall be signed by eight percent of the legal voters in each of two-thirds of the congressional districts in this state and a petition proposing a law shall be signed by five percent of the voters in each of two-thirds of the congressional districts in this state. The question as to whether there are sufficient signatures on a petition can be determined by the Secretary of State by an examination of the petition. It follows that the Secretary of State has the authority and duty to determine whether or not there are sufficient signatures on a petition. If he determines that there are not sufficient signatures on a petition, it is his duty to refuse to issue a certificate.

However, the Secretary of State has no authority to determine that signatures on any petition presented to him are invalid and not genuine and to refuse to count such signatures. The authority of the Secretary of State is limited and he is authorized only to examine the face of the petitions and determine from his examination whether or not there has been compliance with the Constitution and with Chapter 126. The determination of whether or not

Honorable James C. Kirkpatrick

certain names are valid and genuine involves a question of fact and the Secretary of State has no authority to make such a determination. Such a determination can be made only in proper court proceedings. Section 126.081 does not purport to give the Secretary of State any authority to make determinations of fact, but gives him authority only to make findings based upon an examination of the petitions presented to him. The Supreme Court of Missouri in the case of State ex rel. Kemper v. Carter, 165 S.W. 773 held that the Secretary of State has no power to make determinations as to alleged fraudulent and forged signatures on petitions stating, l.c. 781:

"We are not saying that the Secretary of State must file a referendum petition upon which either there is not enough congressional districts represented by the signers thereon, or not enough signers from such or any of such districts. But, where prima facie all of these facts appear, he must file the petition as presented to him, and leave to the courts the determination of questions of latent fraud, forgery, and hermetic illegality, for which determination our statutes, it would seem, have provided full and ample machinery for every condition and contingency, and for the protection and safeguarding of both protagonists and antagonists of the act sought to be referred.
. . ."

The refusal of the Secretary of State to issue his certificate if he determines that a petition is not in compliance with the Constitution and Chapter 126 does not determine the question whether the measure in the petition is to be placed on the ballot and voted on by the electors. The Secretary of State simply determines whether the Constitution and Chapter 126 have been complied with by the petition submitted to him. A determination whether failure to comply with one or more constitutional and statutory requirements is sufficient to keep the proposed measure from being voted on by the electors can be made only by the courts.

CONCLUSION

It is the opinion of this office that:

1. The Secretary of State has the authority to determine whether an initiative petition contains the enacting clause required by the Constitution of Missouri and if he determines that the petition does not contain such constitutional enacting clause, he should refuse to issue his certificate.

Honorable James C. Kirkpatrick

2. The Secretary of State has the authority to determine whether a proposed constitutional amendment contains more than one amended and revised article of the Constitution or one new article which contains more than one subject and matters properly connected therewith and if he determines that the proposed amendment contains more than one amended and revised article or one new article and matters properly connected therewith, it is his duty to refuse to issue his certificate.

3. The Secretary of State has the authority to determine whether an initiative petition contains a full and correct copy of the title of the measure proposed and if he determines that it does not contain a full and correct copy of the title, the Secretary of State should refuse to issue his certificate.

4. The Secretary of State has the authority to determine that an initiative petition contains the number of signatures required by the Constitution and if he determines that the petition does not contain sufficient signatures, it is his duty to refuse to issue his certificate.

5. The Secretary of State has no authority to determine whether names on initiative petitions are valid and genuine but such determination must be left to the courts in proper proceedings.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,

John C. Danforth
JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

July 26, 1972

OPINION LETTER NO. 218

Honorable Robert B. Paden
Prosecuting Attorney
DeKalb County
Maysville, Missouri 64469

Dear Mr. Paden:

This is in answer to your letter of recent date concerning the provisions of House Committee Substitute for Senate Bill No. 496, Second Regular Session, 76th General Assembly, now found as Act 105 in Volume No. 2 of Vernon's Missouri Legislative Service 1972. Your specific inquiry asked whether the fees provided for in Sections 483.530 and 483.610 are applicable only to cases filed after August 13, 1972, the effective date of such act or whether such fees are applicable to cases disposed of after such date.

We are enclosing Opinion No. 428 rendered October 14, 1969, to Donald Geers, which answers the question contained in your letter. It can be seen from the holding of such opinion that the fees provided for in Sections 483.530 and 483.610 are to be collected in all cases which are not terminated before August 13, 1972, the effective date of Senate Bill No. 496.

Very truly yours,

John C. Danforth
JOHN C. DANFORTH
Attorney General

Enclosure

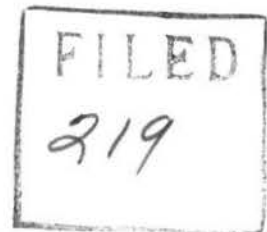
CITIES, TOWNS & VILLAGES:
CONSTITUTIONAL CHARTER CITIES:
PENSIONS:

The provisions of Section 70.610, RSMo, which authorize the governing body of a municipality to elect to come within the provisions of the Missouri Local Government Employees' Retirement System prevail over a charter provision of a constitutional charter city which requires that employee pension or retirement plans be submitted to the voters and that such a city may elect to come within the Local Government Employees' Retirement System by a majority vote of the governing body of such city without submitting the question to the voters.

OPINION NO. 219

October 27, 1972

Honorable Leo W. Schrader
State Representative
815 North Byers
Joplin, Missouri 64801



Dear Representative Schrader:

This opinion is in response to your opinion request in which you ask:

"May a Home Rule Charter City have authority to elect to provide pension and retirement benefits for its employees under the 'Missouri Local Government Employees' Retirement System' (VAMS Section 70.600 et seq) without submission of the question to the voters as required in city's Home Rule Charter?"

You also refer to Section 70.610, RSMo, which provides:

"Each political subdivision, by a majority vote of its governing body, may elect to become an employer and cover its employees under the system, as follows:

(1) The clerk or secretary of the political subdivision shall certify the election to be an employer to the board within ten days after the vote of the governing body. The effective date of the political subdivision's coverage is the first day of the calendar month next following receipt by the board of the election to be an employer, or

Honorable Leo W. Schrader

the operative date of the system, whichever is the later.

(2) An employer must cover all its employees who are neither policemen nor firemen and may cover its policemen or firemen or both."
(Emphasis added)

In addition we understand that Section 5.08 of the Charter of the City of Joplin, in question here, provides in part:

"Additional or substitute pension or retirement plans may be established for any department or agency as authorized by the Constitution or by law, but only after submission to an adoption by the voters."

Such a city is a political subdivision as defined in Section 70.600, RSMo Supp. 1971.

The history of the Missouri case law respecting municipal home rule is thoroughly discussed in "Municipal Home Rule: An Evaluation of the Missouri Experience", 33 Mo.L.Rev. 45 (Winter 1968), James E. Westbrook, and "Local Government in Missouri: The Crossroads Reached", 32 Mo.L.Rev. 73, 78 (Winter 1967), Peter W. Salsish, Jr. Thus, there is little point in repeating a detailed analysis here.

Recent changes in the Missouri Constitution appear additionally to make an examination of the entire case law relating to municipal home rule inappropriate. That is, the previous provision in Section 19, Article VI that the charter of such a city had to be "consistent with and subject to the constitution and laws of the state" was repealed by House Joint Resolution No. 24, 76th General Assembly, adopted by the voters October 5, 1971, which added Section 19(a) to Article VI of the Missouri Constitution, providing:

"Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the Constitution of this State and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law."

Honorable Leo W. Schrader

The precise question then is whether the statutory provisions authorizing the adoption of the plan by the "governing body", Section 70.610, being a separate grant of power by the state legislature is such that it precludes the imposition of the additional charter requirement that requires a favorable vote of the people before the governing body is authorized to act.

It is our view that the provision of the Constitution that such cities shall have "all powers conferred by law" means that a statute enacted by the General Assembly can give or expand powers limited by a city charter. Such a statute authorizes such city to proceed under the statute any provision of the city charter to the contrary notwithstanding. When a legislative grant of power is made to a constitutional charter city any limitation on such power by the city charter is nullified.

Here the legislature has expressly conferred power upon the governing body of the city to elect to become an employer and to cover its employees under the system. This authority is, in our view, consistent with the provision of Section 19(a) of Article VI which provides that such a city shall have all powers conferred by law in addition to its home rule powers. Section 70.610 confers power on the city to become a member of the system upon a majority vote of the governing body of the city. The requirement in the city charter that there shall be submission to the voters of pension or retirement plans purports to deny the city the power to act under authority conferred on it "by law", that is by a majority vote of the governing body of the city and such charter provision is a nullity when the city acts under the provisions of the statute. It follows that such a legislative grant of power controls and that the governing body may elect to bring the employees of the city within the system notwithstanding the charter provision.

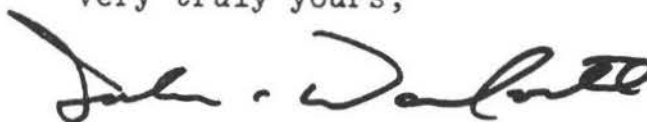
CONCLUSION

It is the opinion of this office that the provisions of Section 70.610, RSMo, which authorize the governing body of a municipality to elect to come within the provisions of the Missouri Local Government Employees' Retirement System prevail over a charter provision of a constitutional charter city which requires that employee pension or retirement plans be submitted to the voters and that such a city may elect to come within the Missouri Local Government Employees' Retirement System by a majority vote of the governing body of such city without submitting the question to the voters.

Honorable Leo W. Schrader

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a more compact, stylized manner.

JOHN C. DANFORTH
Attorney General

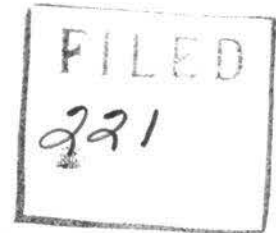
HATCH ACT:
CITY OFFICER:
STATE EMPLOYEE:

The employment, by the Missouri Department of Community Affairs, of a city councilman of Jefferson City, who intends to run for re-election, to a position within the Department of Community Affairs, the salary of which would come entirely out of state funds, and which would be a position having no responsibility, either direct or supervisory, over the administration or disposition of any federal funds or any federally funded programs, would not be in violation of the Hatch Act, because said individual would fall within the exception of Title 5 U.S.C.A. Section 1501(4) (A) as "an individual who exercises no functions in connection with that activity," the activity in question being one financed in whole or in part by the federal government.

OPINION NO. 221

December 13, 1972

Mr. Gene Sally, Director
Department of Community Affairs
505 Missouri Boulevard
Jefferson City, Missouri 65101



Dear Mr. Sally:

In your capacity as Director of the Missouri Department of Community Affairs, you have requested that the office of the Attorney General furnish you with an official Attorney General's opinion. This opinion is in response to your request and is addressed to your inquiry which follows:

"Would the employment of a City Councilman, elected in a partisan election with the stated intent to run for re-election be construed to place that person's employment under the provisions of the Hatch Act, if he was paid entirely out of state funds, if his services were never used as 'in-kind' match, and if he had no supervisory responsibility for the administration of any federally funded programs?"

To provide a further factual basis upon which the resolution of your legal inquiry can be made, you have furnished this office with a brief statement of the facts which prompted your inquiry. A duly elected city councilman of Jefferson City, Missouri, has applied for employment with the Missouri Department of Community Affairs. The Department has a position available and would like

Mr. Gene Sally

to offer that position to the applicant. The city councilman in question intends to run for reelection to the city council upon the expiration of his present term. The position within the Department of Community Affairs which is available and which would be filled by this individual is funded completely by state appropriations. The entire salary of the applicant would be paid out of state funds. The applicant's duties with the Department would be concerned with state functions and programs, although he would necessarily have occasional incidental contact with federally funded activities administered by or participated in by the Department of Community Affairs. The applicant's proposed employment would be in a position without authority to control the federal funding of any local agency, nor would his position have authority to participate in the decisions of the Department regarding the disposition of federal funds provided the state. The applicant would not participate in the direct administration of any federal programs and would be without supervisory authority over individuals involved in administering federally funded programs. State funds, with which the applicant would be solely concerned, are accounted for separately within the Department of Community Affairs from federal funds. For the current fiscal year, the activities of the Department of Community Affairs will be approximately 68% funded by the federal government. The individual would be employed specifically in the governmental services section of the Department of Community Affairs which is approximately 45% federally funded.

Your question is whether such an individual holding the proposed position with the Department of Community Affairs and choosing to campaign for reelection would be in violation of the Hatch Act. The resolution of this inquiry depends on how broadly the Hatch Act is to be construed.

Initially, we must determine if the proposed political activities of the applicant are those which the Hatch Act was intended to prohibit. The applicant presently holds the elective office of city councilman. He has expressed an intention to campaign for reelection upon the expiration of his present term. Title 5 U.S.C.A. Section 1502(a) (3), provides that "a State or local officer or employee may not . . . take an active part in political management or in political campaigns." Subsection (c) (4) exempts "an individual holding elective office." The federal case law on the subject makes it clear that the elective office exemption quoted above does not authorize an individual holding an elective office apart from his employment in a federally assisted agency to participate in political campaigns. Northern Virginia Regional Park Authority v. United States Civil Service Commission, 437 F.2d 1346 (4th Cir. 1971) cert. denied 403 U.S. 936; In Re Higginbotham, 340 F.2d 165 (3rd Cir. 1965) cert. denied 382 U.S. 853. We quote from the Northern Virginia Regional Park Authority case:

Mr. Gene Sally

"The legislative purpose of the subsection was to exempt a small but important number of elected state officers and employees whose official duties in their elective positions involve the administration of federally assisted projects. Thus 5 U.S.C. § 1502(c) exempts Governors, Lieutenant Governors, Mayors, elected heads of executive departments, and 'individual[s] holding elective office.' This last clause was designed to encompass a residual category of state officers, such as an elected state highway commissioner for example, whose elective position includes responsibility for federally funded programs. It was far from the purpose of the exemptive provision to tolerate political activity by an employee of an agency administering federal funds merely because he happens to have been elected to an entirely unrelated office." Id. at 1351-1352

If the applicant's employment to the proposed position within the Department of Community Affairs would make him otherwise subject to the Hatch Act, his actions in campaigning for reelection for the city council would be in violation of that Act.

There remains the more difficult question of whether the position within the Missouri Department of Community Affairs under consideration is such as would preclude its holder from prohibited political activity. Title 5 U.S.C.A. Section 1501(4) defines "State or local officer or employee" for purposes of the Hatch Act as:

". . . an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include --

(A) an individual who exercises no functions in connection with that activity; . . ."

There is no question but what the Missouri Department of Community Affairs is a "State or local agency" for purposes of the Hatch Act. Likewise, it is clear that the Missouri Department of Community Affairs receives federal loans and grants. Also, the facts given indicate that the individual would be principally employed by the Department of Community Affairs. Is the nature of the particular position under question such as would invoke the operation of the Hatch

Mr. Gene Sally

Act, i.e., is his employment by Community Affairs "in connection with an activity . . . financed . . . by the United States" and does the individual exercise any "functions in connection" with such an activity?

If the language employed by the Hatch Act, quoted immediately above, is to have any meaning at all, we must conclude that an individual employed under the circumstances as set forth in your opinion request would not be subject to the Hatch Act. Although the Department of Community Affairs is 68% federally funded, the position in question is to be remunerated entirely by state funds. The individual holding that provision is to have absolutely no connection or authority, either direct or supervisory, over any program which is federally funded. Not only would an individual holding the position have no decision making authority regarding the disposition of federal funds, nor supervisory authority over any employee by the Department of Community Affairs connected with the federal funding process, but, in addition, entirely separate accounting controls are to be applied to the position in question and the programs which the individual holding that position would have authority over. We have taken your representation that the position in question would sometimes come into contact with federally funded programs not to mean that an individual holding said position would have any direct or supervisory authority in relation to those programs. If such was the case, the Hatch Act would apply. We believe that our conclusion regarding the provision in question is consistent with the proposition that "[t]he end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship." Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947); see also, United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). Under the facts as supplied by your opinion request, the position in question would have absolutely no authority in connection with the disposition of federal funds.

In reaching the conclusion that an individual holding the position hypothesized within the Department of Community Affairs would not be subject to the operation of the Hatch Act, we rely primarily on Title 5 U.S.C.A. Section 1501(4) (A). That is, an individual holding such position would be one "who exercises no functions in connection with that activity," that activity meaning one which was financed in whole or in part by the federal government. You will note that Section 1501(4) requires principal employment in connection with such an activity in order for the Hatch Act to apply. We expressly do not reach the question of whether the provision in question would involve "principal employment . . . in connection with an activity which is financed in whole or in part . . .

Mr. Gene Sally

by the United States" Federal case law regarding the Hatch Act makes it difficult to apply the "principal employment" provision to the circumstances presently presented by your opinion request.¹

Even if we were to accept the position that the mere fact of an individual's full time employment with a state agency which is partially federally funded fulfills the requirement of "principal employment" to invoke the applicability of the Hatch Act, we believe an individual holding the position in question with the Department of Community Affairs would fall within the exception to the Hatch Act as "an individual who exercises no function in connection with that activity" (an activity financed in whole or in part by the federal government). We quote as follows from Anderson v. United States Civil Service Commission, 119 F.Supp. 567, 573 (D. C. Mont. 1954):

" . . . [This exception] . . . means if his employment, principal employment, is with the State agency, by reason of subdivision (e) he would still not be subject to the Hatch Act if his particular duties with the State agency did not involve the exercise of some function in respect to a federally financed activity, . . . "

¹In Palmer v. United States Civil Service Commission, 297 F.2d 450 (7th Cir. 1962) cert. denied 369 U.S. 849, 8 L.Ed.2d 8, 82 S. Ct. 932 (1962), the Illinois Department of Conservation was approximately 8% federally funded. The Director of the Illinois Department of Conservation, Palmer, argued that his personal connection with federally funded activities should be viewed as de minimis. The Seventh Circuit found that, by reason of Palmer's supervisory capacity, "[h]is duties in connection with federally financed activities took up at least fifty percent of his time. Palmer plainly met the test that his 'principal employment' was 'in connection with any activity which is financed in whole or in part by loans or grants made by the United States or any Federal agency.'" Id. at 454. The Seventh Circuit, in applying the Hatch Act to Palmer, considered the specific position that Palmer held and the connection that position had with federally financed activities. It is implicit in that opinion that the principal employment of Palmer as Director of the Illinois Department of Conservation governs whether the Hatch Act would apply rather than the principal employment of the Department itself which was partially financed with federal funds. The District Court in Palmer, in overlooking the capacity of the employee as a supervisor, had held that Palmer was not principally employed in connection with federally aided projects

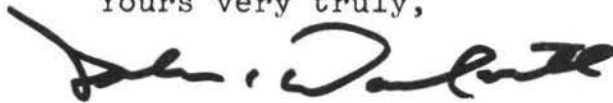
Mr. Gene Sally

CONCLUSION

Therefore, it is the opinion of this office that the employment, by the Missouri Department of Community Affairs, of a city councilman of Jefferson City, who intends to run for reelection, to a position within the Department of Community Affairs, the salary of which would come entirely out of state funds, and which would be a position having no responsibility, either direct or supervisory, over the administration or disposition of any federal funds or any federally funded programs, would not be in violation of the Hatch Act, because said individual would fall within the exception of Title 5 U.S.C.A. Section 1501(4) (A) as "an individual who exercises no functions in connection with that activity," the activity in question being one financed in whole or in part by the federal government.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Michael L. Boicourt.

Yours very truly,



JOHN C. DANFORTH
Attorney General

cont'd

and that .063% of his time only was personally spent on such projects and that such constituted a de minimis participation. Palmer v. United States Civil Service Commission, 191 F.Supp. 495 (S.D. Ill. S.D. 1961).

Other cases have considered only whether an individual's employment with the agency in question was principal, and, upon a finding in the affirmative on that issue, have concluded that if the state agency itself receives substantial federal funds that the individual is covered by the Hatch Act. See Anderson v. United States Civil Service Commission, 119 F.Supp. 567 (D.C. Mont. 1954); State of Ohio v. United States Civil Service Commission, 65 F.Supp. 776 (S.D. Ohio E.D. 1946); Smyth v. United States Civil Service Commission, 291 F.Supp. 568 (E.D. Wis. 1968); and State of Utah v. United States, 286 F.2d 30 (10th Cir. 1961).



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

August 14, 1972

OPINION LETTER NO. 227

Honorable Dan Harmon
State Representative
Post Office Box 465
Noel, Missouri 64854

Dear Representative Harmon:

This letter is in response to your opinion request in which you ask:

"Does the payment of current intangible and/or tangible personal back taxes and possession of back tax receipts fulfill the requirement of Section 57.010, RSMo 1969, with respect to the 'resident taxpayer' requirement to hold the county office of sheriff."

You also state that:

"The individual who is a candidate for sheriff did not pay any real or tangible personal property tax in 1971. He subsequently in 1972 turned in a tangible personal property assessment list and paid personal property tax for 1971 in 1972 with interest and was issued a receipt therefor. He made returns and paid intangible personal property taxes in 1971 and 1972."

Section 57.010, RSMo 1969 to which you refer, with respect to the qualifications of candidates for the office of sheriff, states in part:

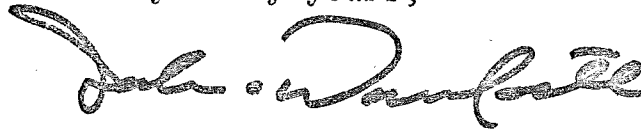
". . . Such person shall be a resident taxpayer and elector of said county, shall have

Honorable Dan Harmon

resided in said county for more than one whole year next before filing for said office and shall be a person capable of efficient law enforcement. . . ."

We believe that under the reasoning of Opinion No. 82, dated March 29, 1935, to Searcy, copy enclosed, that such a person who has paid intangible personal property taxes, which are property taxes under the provisions of Section 4(a), Article X, Missouri Constitution, is a taxpayer within the meaning of Section 57.010 although we do not purport to determine any question of residency.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 82
3-29-35, Searcy

DEAD BODIES:
ANATOMICAL BOARD:
STATE ANATOMICAL BOARD:

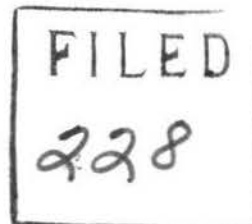
Only educational institutions that
have a department of anatomy and
in which human anatomy is investi-
gated or taught to all students in

attendance at such institution or to all students in attendance at
a school or department of such educational institution come within
the provisions of Section 194.120, RSMo 1969, and are entitled to
receive human cadavers from the State Anatomical Board. Penn Valley
Community College is not entitled to receive human cadavers from
the State Anatomical Board.

OPINION NO. 228

September 19, 1972

Mr. E. W. Lowrance, Secretary
Missouri State Anatomical Board
Department of Anatomy
University of Missouri Medical Center
Columbia, Missouri 65201



Dear Mr. Lowrance:

This is in response to your request for an opinion from this
office as follows:

"Is Penn Valley Community College in Kansas
City, Missouri an educational institution
which can meet fully the requirements set
forth in Sections 194.120 to 194.180, autho-
rizing certain institutions to receive un-
claimed human cadavers, when said institu-
tion accepts and complies with the provisions
of Sections 194.120 to 194.180 particularly
as follows:

1. By having corporate status (194.
120*); (this provision presumably
fulfilled by legislative defini-
tion 178.770)
2. By having an appropriately trained
(by inference) faculty member (i.e.,
head of department, professor or
associate professor of anatomy**) who
can occupy a place on the Mis-
souri State Anatomical Board (194.
120);

Mr. E. W. Lowrance

3. By having a scheduled course or place in the curriculum in which human anatomy is taught or investigated to or by students in attendance (194.120);
4. By providing the secretary of the Board with a certified statement of school enrollment (194.140-1);
5. By posting a \$1000.00 bond (194.140-2);
6. By paying a prescribed assessment proportional to school enrollment (194.130-3);
7. By properly utilizing, safeguarding and disposing of cadavers received (194.140-2, intent)?"

You further state that:

"To date the Missouri State Anatomical Board has distributed unclaimed cadavers to incorporated; medical and dental schools; schools of osteopathic medicine; chiropractic schools; special groups of physicians and surgeons organized to carry out anatomical investigation (e.g. Kansas City Anatomical Society). Each of these schools and groups, deemed to be operating at senior college, professional or graduate level involving mature, specialized students, presented obvious need for human material which material has been properly used and safeguarded."

The distribution of dead human bodies is provided for under Chapter 194, RSMo.

Section 194.120, RSMo, provides:

"1. That the heads of departments of anatomy, professors and associate professors of anatomy at the educational institutions of the state of Missouri which are now or may hereafter become incorporated, and in which said educational institutions human anatomy is investigated or

Mr. E. W. Lowrance

taught to students in attendance at said educational institutions, shall be and hereby are constituted the Missouri State Anatomical Board, herein referred to in sections 194.120 to 194.180 as 'the board'.

"2. The board shall have exclusive charge and control of the disposal and delivery of dead human bodies, as described in sections 194.120 to 194.180, to and among such educational institutions as under the provisions of said sections are entitled thereto.

"3. The secretary of the board shall keep an accurate record of all bodies received and distributed by the board, showing the dates of receipt and distribution, the sources from which they came to the board, and the name and address of the educational institutions to which the same were sent, which record shall be at all times open to the inspection of each member of the board and of any prosecuting attorney or circuit attorney of any county or city within the state of Missouri."

Section 194.160, RSMo, provides in part:

"1. The secretary of the board shall cause to be distributed the bodies aforesaid, to any of the educational institutions mentioned in section 194.120, upon the acceptance and compliance by said educational institution with the provisions of section 194.120 to 194.180, in proportion to the number of students in attendance at said educational institutions where the subject of human anatomy is studied or investigated."

Under Section 194.160, supra, educational institutions mentioned in Section 194.120, supra, are entitled to receive a dead human body upon compliance with other provisions of the statutes which require such educational institution to execute a penal bond conditioned that all bodies received shall be used only for the promotion or application of anatomical knowledge and science, and other statutory requirements concerning the disposition of such bodies or parts of such bodies which they receive.

Under Section 194.160, supra, we must look to Section 194.120 to determine the educational institutions which are entitled to receive dead human bodies.

Mr. E. W. Lowrance

Section 194.120 provides in part that the head of departments of anatomy, professors and associate professors of anatomy at the educational institutions in which human anatomy is investigated or taught "to students in attendance at said educational institution" are members of the Missouri State Anatomical Board. Such educational institutions are likewise entitled to receive dead human bodies for the purpose of teaching human anatomy.

Section 194.130, RSMo, provides that each educational institution accepting provisions of this law shall remit to the board a sum fixed and determined by said board in proportion to the total number of students in attendance at said educational institution. The funds so received are to be used in providing for the expenses incurred by the State Anatomical Board.

Section 194.140, RSMo, requires the president and secretary, or the dean and registrar of such educational institutions to furnish the secretary of the board a sworn statement setting forth the number of students in attendance at such educational institution.

Webster's New International Dictionary, Second Edition, defines anatomy as the art of dissecting or artificially separating the different parts of any animal or plant, to ascertain their position, relations, structure, and function.

The question is what educational institutions did the legislature intend to come within the provisions of these statutes.

The basic rule of statutory construction is to seek the legislative intent and effectuate it if possible, and the law favors construction which harmonizes this with reason, and tends to avoid unjust, absurd, unreasonable and conflicting results. *State ex rel. Stern Brothers & Co. v. Stilley*, 337 S.W.2d 934 (Mo. 1960). Statutes relating to same subject matter should be considered together and construed if possible so as to harmonize and be consistent with each other in reference to the subject involved. *State ex rel. Hand v. Bilyeu*, 346 S.W.2d 221 (Spr.Ct.App. 1961) transferred 351 S.W.2d 457 (Mo. banc 1961). The construction of statutes by public officials charged with their execution, especially when it has long prevailed, is entitled to great weight and should not be disregarded except for cogent reasons, and unless it be clear that such construction is erroneous. *In re Bernays' Estate*, 126 S.W.2d 209 (Mo. 1939).

These statutes governing the disposition of dead human bodies have been in substantially the same form since they were first enacted in 1907 and enforced by the State Anatomical Board.

Mr. E. W. Lowrance

With these rules of statutory construction in mind what educational institutions are entitled to receive dead human bodies under the provision of Section 194.120, supra.

It is our view that only schools of medicine of the various universities or other separate schools or departments where all the students enrolled in the separate school or department are required to study anatomy come within the provisions of these statutes. It is our view that the legislature had in mind when this statute was enacted for it to apply to educational institutions in which human anatomy was taught to all students in attendance such as medical schools and colleges in which dissection of the human body is taught as a part of their course of study. This has been the interpretation made by the Missouri State Anatomical Board in the past and we believe it is the correct interpretation of this statute. The fact that the statutes require the State Anatomical Board to distribute the dead human bodies to the schools in proportion to the number of students in attendance at such schools and such educational institutions are required to pay a fixed sum to such board depending upon the number of students enrolled indicate this statute applies only to educational institutions in which all the students enrolled are required to study anatomy. We believe it would be unreasonable to hold that the statute was intended to apply to all incorporated, educational institutions in which a course in anatomy is taught such as Penn Valley Community College. This probably would include most liberal art colleges and possibly some high schools in the state. We believe the fact that the statutes require the human bodies be allocated to the schools in proportion to the number of students in attendance at the school indicate that the legislature had in mind only schools in which all the students enrolled were required to study anatomy. To hold otherwise, we believe, would be unreasonable construction of the statutes.

CONCLUSION

It is the opinion of this office that only educational institutions that have a department of anatomy and in which human anatomy is investigated or taught to all students in attendance at such institution or to all students in attendance at a school or department of such educational institution come within the provisions of Section 194.120, RSMo 1969, and are entitled to receive human cadavers from the State Anatomical Board. Penn Valley Community College is not entitled to receive human cadavers from the State Anatomical Board.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

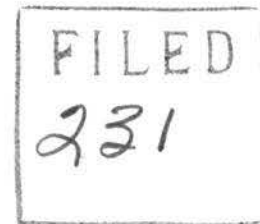


JOHN C. DANFORTH
Attorney General

December 1, 1972

OPINION LETTER NO. 231
Answer by letter-Jones

Mr. G. L. Donahoe
Executive Secretary
The Public School Retirement
System of Missouri
Post Office Box 263
Jefferson City, Missouri 65101



Dear Mr. Donahoe:

This letter is to acknowledge receipt of your request for an opinion from this office which reads as follows:

"We need your opinion and advice in response to the following procedural questions which, it appears, must be answered before we can implement the provisions of CCS HB613 as enacted by the 76th General Assembly and approved by the Governor.

"1. Is the Board of Trustees obligated to inform all eligible retired members of their eligibility and to provide each an application for employment?

"2. After an application for employment has been received, will it be necessary for the Board of Trustees to have a completed contract of employment signed by the applicant?

"3. a. If a retired member elected to receive a reduced benefit under either Option 1 or Option 2, how will the determination of eligibility be determined; i.e., on the basis of the amount which

Mr. G. L. Donahoe

the retired member would have received if he had requested Regular Retirement, or on the basis of the amount which he is receiving with the election of an option?

b. Will the response to (a) be applicable in the case of an individual who retired prior to the attainment of normal retirement age and received a reduced benefit?

"4. How will the determination of eligibility be made for retired members who last served, before retirement, in positions in which the members contributed only two-thirds of the contribution rate and received only two-thirds of the benefits as provided for in Section 169.070.10?

"5. Will the payments made to the retired members be considered as compensation for services rendered or as gratuities (this would appear to be a decision necessary to a determination of the withholdings which should be made from the individual payments)?

"6. If the payments are considered as compensation, will the following retired members be eligible to file an application for employment:

a. One who has been adjudged legally incompetent.

b. One who has been retired with a disability retirement allowance.

c. One who is living out of Missouri."

Section 1 of Conference Committee Substitute for House Bill No. 613, as enacted by the 76th General Assembly and approved by the Governor, reads as follows:

"1. Any retired teacher now receiving retirement benefits, who served five years or more as a teacher in the public schools of

Mr. G. L. Donahoe

this state and who retired after June 30, 1957, and prior to January 1, 1971, under the provisions of chapter 169, RSMo, shall, upon application to the retirement system from which he is receiving retirement benefits be employed by that retirement system as a special school advisor and supervisor. Any person so employed shall perform such duties as the board of trustees of the retirement system of which he becomes an employee directs, and shall receive a salary of five dollars per month for each year of teaching service not to exceed seventy-five dollars per month, payable by the retirement system as part of its administrative costs, but the payment to the retired person for such services, together with the retirement benefits he receives under chapter 169, RSMo, shall not exceed one hundred fifty dollars per month. The employment provided for by this act shall in no way affect any person's eligibility for retirement benefits under chapter 169."

In response to your first question, while there is no specific requirement in Section 1 of Conference Committee Substitute for House Bill No. 613, it is our view that there is an implied requirement that the system notify eligible members for the reason that the system has access to all of the addresses of retired members based upon the records in its office and a member may not otherwise know of his eligibility. In addition, Section 1 of the bill provides that a person shall upon application be employed by the retirement system and paid for such employment. It is, therefore, our view that such clear statutory language means that such persons are to be employed only upon application and that the employment should commence only when such application for employment is received by the system. However, it should also be noted that if any eligible individuals have previously sent letters to the system asking that they be employed, then it is our view that this is sufficient for them to be considered to have been employed as of the date the letters were received by the system.

In regard to your second question, it is our view that it will not be necessary for the board of trustees to have a contract of employment signed by the applicant. The basic rule of statutory construction is to seek the intention of the lawmakers and, if possible, to effectuate that intention, and the court should ascertain the legislative intent from the words used, if possible, and should ascribe to the language used, its plain and rational meaning. State ex rel. Clay Equipment Corporation v. Jensen, 363 S.W.2d 666

Mr. G. L. Donahoe

(Mo. Banc 1966). Under such circumstances, Section 1 provides that a qualified retired teacher ". . . shall, upon application to the retirement system from which he is receiving retirement benefits be employed by that retirement system as a special school advisor and supervisor. . . ." However, there is no express requirement that a retired teacher complete a contract of employment. Therefore, after an application for employment has been received, it is our opinion that it will not be necessary for the board of trustees to have a contract of employment signed by the applicant.

We next consider your third and fourth questions. Subsection 1 of Section 169.070, RSMo 1969, provides that a member may retire whose age at retirement is sixty years or more and whose creditable service is five years or more, or whose creditable service is forty years or more. Subsection 2 of Section 169.070, RSMo 1969, provides that a member whose age at retirement is sixty years or more or whose creditable service is forty years or more may elect to receive a reduced allowance under an option and thereby provide an allowance for a designated beneficiary who may survive at his death. Under Option 1, the payment to the member and to the designated beneficiary will be in the same amount. Under Option 2, the payment to the designated beneficiary will be one-half the amount of the payment to the member. The election of the option must be made in the application for retirement which must be filed with the retirement office prior to the date on which retirement of the member is to become effective. Subsection 3 of Section 169.070, RSMo 1969, also provides that a member may retire if less than sixty years of age and whose creditable service is thirty years or more and receive the actuarial equivalent of the allowance to which his creditable service would entitle him if his age were sixty. Lastly, subsection 10 of Section 169.070 provides that the contribution rate for a member of the system for whom Federal Old Age and Survivors Insurance Tax is paid from state and local funds on account of employment entitling him to membership in the system, is two-thirds of the rate for the other members of the system. The benefits for such a member are two-thirds of the benefits provided for the other members of the system because of services after July 1, 1961. Also, if a member made retroactive contributions because of salaries received from employment entitling him to membership in the system and from Federal Old Age and Survivors Insurance Tax was paid from state or local tax funds during the period July 1, 1957 to July 1, 1961, the benefits for the entire period of creditable service is two-thirds of the benefits for other members of the system. If a member did not elect to make retroactive contributions, the benefits because of services prior to July 1, 1961, are determined in accordance with the provisions of the law in effect prior to that date.

Mr. G. L. Donahoe

In connection with the above, Section 1 of House Bill No. 613 provides that "Any retired teacher now receiving retirement benefits, . . . shall, upon application to the retirement system from which he is receiving retirement benefits be employed by that retirement system" (emphasis ours). In this regard, it should be pointed out that Section 1 of House Bill No. 613 does not specifically provide that a member must be receiving a regular retirement allowance to be eligible for employment, but only that he is receiving retirement benefits, consequently, there is authority for the proposition that where statutes are plain, unambiguous, and simple, there is no room for construction and they must be applied by courts as they are written by the legislature. United Air Lines, Inc. v. State Tax Commission, 377 S.W.2d 444 (Mo. Banc 1964). Therefore, in response to questions 3 and 4, it is our opinion that a member's eligibility for employment under House Bill No. 613 is determined on the basis of the amount which the member is actually receiving and not on the basis of the amount which the retired member would have received if he had requested a regular retirement allowance. However, it should also be noted that House Bill No. 613 applies only to retired teachers and does not apply to survivors of a teacher if the member elects one of the options under subsection 2 of Section 169.070, RSMo 1969.

We next consider your fifth question in regard to whether or not payments to retired members under House Bill No. 613 are subject to withholding for social security and federal income tax purposes. In this regard, it is our view that any questions as to whether such amounts are subject to federal income tax and social security withholdings should be directed to Mr. Hiram Ford, District Manager, Social Security Administration, 113 West Miller Street, Jefferson City, Missouri, and the District Director of Internal Revenue, 1114 Market Street, St. Louis, Missouri. However, in order to expedite the implementation of House Bill No. 613, it is our view that the retirement system should begin making payments, and notify eligible members that it is doing so, without making deductions for social security or federal income tax withholdings, pending a final decision from the federal authorities.

Lastly, we consider your sixth question. In this regard, it is our view that it was the intent of the legislature that any retired teacher now receiving retirement benefits, and who meets the other qualifications of Section 1 of House Bill No. 613 is eligible to file an application for employment. Therefore, it is our opinion that the guardian of one who has been adjudged legally incompetent, or one retired with a disability retirement allowance, or

Mr. G. L. Donahoe

one who is living out of Missouri, is eligible to file an application for employment.

Yours very truly,

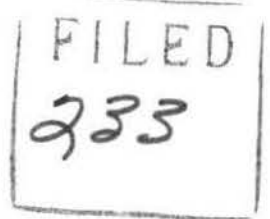
JOHN C. DANFORTH
Attorney General

SCHOOLS: A teacher is a permanent teacher, under
TEACHERS: the provisions of Section 168.104(5)
TEACHER TENURE: of the Teacher Tenure Act (Sections
168.102 to 168.130, RSMo 1969), if he
has been employed as a full-time teacher in the same school
district for four successive years and reemployed for a fifth
successive year after previously having been employed two years
or more by another school district.

October 24, 1972

OPINION NO. 233

Honorable J. William Holliday
Clark County Prosecuting Attorney
220 North Morgan
Kahoka, Missouri 63445



Dear Mr. Holliday:

This official opinion is issued in response to your request for a ruling on whether a teacher is a permanent teacher, under the provisions of the Teacher Tenure Act (Sections 168.102 to 168.130, RSMo 1969), if he has been employed as a full-time teacher in the same school district for five successive years after having been employed for four years by other Missouri school districts.

The following facts that you gave us are used as the basis for this opinion: The board of education of a six-director school district notified one of its teachers before April 15, 1972, that he would not be retained for the 1972-1973 school year. The superintendent of the school district told the high school teacher that he was not a permanent teacher and that he would not be offered a contract for the forthcoming school year because the school district could no longer afford to employ a guidance counselor at his salary level. The teacher was employed by this school district for five successive years (the school years of 1967-1968 through 1971-1972). Prior to 1967, he was employed for two years by each of two other Missouri school districts.

A probationary teacher is defined in the Teacher Tenure Act (Sections 168.102 to 168.130, RSMo 1969) as follows:

"'Probationary teacher,' any teacher as herein defined who has been employed full time in the same school district for five successive years or less. . . . In the case of any probationary teacher who has

Dr. Arthur L. Mallory

been employed in any other school system as a full-time teacher for two or more years, the board of education shall waive one year of his probationary period."
Section 168.104(5), RSMo 1969.
(Emphasis added.)

A permanent teacher, under the Teacher Tenure Act, is defined as follows:

"'Permanent teacher,' any teacher who has been employed or who is hereafter employed as a teacher in the same school district for five successive years and who has continued or who thereafter continues to be employed as a full-time teacher by the school district; . . ."
Section 168.104(4), RSMo 1969. (Emphasis added.)

In Opinion No. 371, Mulvaney, October 2, 1970, we held that a teacher who has served only five successive years in the same school district had not achieved "permanent teacher" status, as defined in Section 168.104(4), RSMo 1969. As we indicated in that opinion, "the critical point in time for achieving permanent teacher status is reemployment for the sixth successive year by the same school district." (Emphasis added.)

The facts of the instant situation present a significant exception to this general requirement that a teacher must serve a probationary period of five successive years and be reemployed for the sixth to achieve permanent teacher status. The board of education, under Section 168.104(5), RSMo 1969, must waive one year of a teacher's probationary period if he has been employed in any other school system as a full-time teacher for two or more years. The teacher in question, after having taught two years in another school system, had been employed in this school district for four successive years (school years 1967-1968 through 1970-1971) prior to entering into a contract for the fifth successive school year (1971-1972). Upon reemployment for the 1971-1972 school year, he became a permanent teacher, as defined by Sections 168.104(4) and 168.104(5), RSMo 1969.

CONCLUSION

Therefore, it is the conclusion of this office that a teacher is a permanent teacher, under the provisions of Section 168.104(5) of the Teacher Tenure Act (Sections 168.102 to 168.130, RSMo 1969), if he has been employed as a full-time teacher in the

Dr. Arthur L. Mallory

same school district for four successive years and reemployed for a fifth successive year after previously having been employed two years or more by another school district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

Enclosure:

Opinion No. 371, Mulvaney, 10-2-70

LIBRARIES:
COUNTY LIBRARIES:

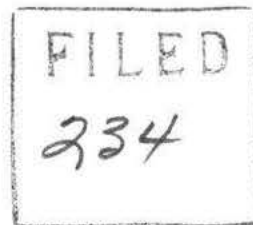
A library district which desires
to invest its funds in accordance
with provisions of Section 182.800,

RSMo Supp. 1971, should do so by drawing a warrant on a city or
county treasury where such funds are deposited for the amount of
the investment. The investment should be held by the board of
trustees of the library district in the name of the district.

OPINION NO. 234

November 10, 1972

Mr. Charles O'Halloran
State Librarian
Missouri State Library
308 East High Street
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This is in response to your request for an opinion on the following question:

"Section 182.800, RSMo, (H.B. 104, 75th General Assembly) provides that a library district may invest its funds and that interest accrued from such an investment shall be credited to the library district fund from which the money was invested.

"Section 182.020 and Section 182.140 provides that funds belonging to a library district be deposited in the treasury of the county or of the city.

"May a library district invest its funds on its own behalf, or must this investment be made by the county treasurer or the city finance office?"

The relative statutory sections to your request are as follows:

"The governing board of any free library district may invest funds of the district. The board may invest the funds in either open time deposits for ninety days or certificates of deposit in a depository selected by the board, if the depository has deposited securities under the provisions of sections 110.010 and

Mr. Charles O'Halloran

110.020, RSMo; or in bonds, redeemable at maturity at part, of the state of Missouri, of the United States, or of any wholly owned corporation of the United States; or in other short term obligations of the United States. No open time deposits shall be made or bonds purchased to mature beyond the date that the funds are needed for the purpose for which they were received by the district. Interest accruing from the investment of funds in such deposits or bonds shall be credited to the library district fund from which the money was invested." (Section 182.800, RSMo Supp. 1971)

"2. The proceeds of the levy, together with all interest accruing on same, with library fines, collections, bequests and donations in money shall be deposited in the treasury of the county and be known as the 'county library fund', and be kept separate and apart from other moneys of the county, and disbursed by the county treasurer only upon the proper authenticated warrants of the county library board." (Section 182.020.2, RSMo 1969)

"2. The tax specified in the notice, subject to the provisions of this section, shall be levied and collected, from year to year, in like manner with other general taxes of the city. The proceeds of the levy, together with all interest accruing on same, with library fines, collections, bequests and donations in money shall be deposited in the city treasury and shall be known as the 'city library fund', and shall be kept separate and apart from other moneys of the city, and disbursed by the proper city finance officer only upon proper authenticated warrants of the city library board of trustees." (Section 182.140.2, RSMo 1969)

Sections 182.020.2 and 182.140.2 provide that funds collected by the library are to be deposited in the city or county treasury, as the case may be, in a separate library fund to be dispersed only upon the proper authenticated warrants of the library board.

Mr. Charles O'Halloran


Section 182.800 provides that the governing board of the library district may invest funds in certain securities. When a library board desires to invest funds under the provisions of Section 182.800, it should draw its warrant on the city or county treasury for the amount it desires to invest. The investment should be held by the board of trustees in the name of the library district. Interest received by the district as well as the principal of such investment at maturity should be deposited in the library fund in the city or county treasury.

CONCLUSION

It is, therefore, the opinion of this office that a library district which desires to invest its funds in accordance with provisions of Section 182.800, RSMo Supp. 1971, should do so by drawing a warrant on a city or county treasury where such funds are deposited for the amount of the investment. The investment should be held by the board of trustees of the library district in the name of the district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Yours very truly,

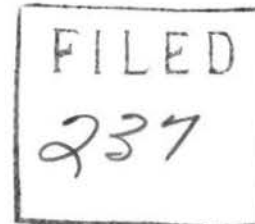
A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

August 30, 1972

OPINION LETTER NO. 237
Answer by Letter - Klaffenbach

Honorable Vic Downing
State Representative
Rural Route 1
Bragg City, Missouri 63827



Dear Representative Downing:

This letter is in answer to your opinion request in which you ask whether Senate Bill No. 613 of the 76th General Assembly, Second Regular Session, with respect to student financial assistance is in violation of the Missouri Constitution.

We have examined the Act in question and we find no clear violation of the Constitution.

It is a well settled principle of constitutional construction that only when there is a clear conflict between a legislative enactment and the Constitution are the courts warranted in declaring the law to be void. In the Matter of Burris, 66 Mo. 442, 450 (1877); Borden Co. v. Thomason, 353 S.W.2d 735, 743 (Mo. 1962).

Further it is our understanding that the Act will undoubtedly be challenged in the Missouri courts and therefore it would not be proper and it would serve no purpose for us to provide you with a detailed analysis of our views.

Very truly yours,

JOHN C. DANFORTH
Attorney General



OFFICE OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

September 19, 1972

OPINION LETTER NO. 246

Honorable Richard E. Martin
State Representative
912 Corby Building
St. Joseph, Missouri 64501

Dear Representative Martin:

This letter is in response to your opinion request in which you ask:

"Does a sewer district organized under the provision of Sec. 249.760 to 249.810 R.S.M.O. have the authority to furnish fire protection to the property within the area of the sewer district? If it does have that authority, does it have the further authority of contracting with an adjoining city so that the city furnishes fire protection to the sewer district in return for proper payment by the sewer district?"

Our examination of the sections relating to such sewer districts reveals no express authority for the furnishing of fire protection by such a district and in our view none can be implied.

The question has also been raised as to whether subsection 1 of Section 249.777, RSMo 1969, contains such authority. Subsection 1 provides:

"A sewer district organized under the provisions of sections 249.760 to 249.810 is a political subdivision of the state and as such has the same rights and privileges and is subject to the same legal restrictions as are other similar political subdivisions."

Honorable Richard E. Martin

This subsection, in our view, is standard legislative phraseology which concerns only the rights and privileges of the sewer district as a political subdivision and clearly does not confer power to provide a service, such as fire protection service, which is not otherwise authorized by the statutes.

Our answer to your question is therefore that a sewer district organized under the provisions of Sections 249.760 to 249.810, RSMo, does not have the authority to furnish fire protection service to the property within the area of the sewer district.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

November 30, 1972

OPINION LETTER NO. 247

Honorable Don Owens
State Senator, District 20
Gerald, Missouri 63037

Dear Senator Owens:

This is in response to your opinion request in which you ask the following question:

"May the Mayor and Board of Aldermen of a Fourth Class City in a Second Class County appoint a Police Judge for said City?"

In Letter Opinion No. 129, January 29, 1971, to the Honorable George P. Dames, a copy of which is enclosed for your information, we concluded that in fourth class cities located in non-first class charter counties, the Board of Alderman and the Mayor had no authority to appoint the police judge.

Pursuant to your request for an opinion on the same question, we have reviewed the holding in Letter Opinion No. 129, and remain of the opinion that the views therein expressed are correct.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Ltr. Op. No. 129
1-29-71, Dames

Op. No. 376
9-18-69, Branom

September 27, 1972

OPINION LETTER NO. 249
Answer by letter-Wieler



Mr. Dexter D. Davis
Commissioner of Agriculture
Department of Agriculture
Post Office Box 630
Jefferson City, Missouri 65101

Dear Mr. Davis:

This is in response to your request for an opinion as to whether or not a non-profit cooperative marketing association, organized under Chapter 274, RSMo 1969, is exempt from the licensing requirements of the Missouri Livestock Marketing Law, Chapter 277, RSMo 1969.

It is our understanding that your inquiry concerns non-profit cooperative marketing associations which engage in the business of operating a "livestock sale or market" as such term is defined in Section 277.020, RSMo.

Section 277.030, RSMo 1969, provides that:

"No person as defined in this chapter shall engage in the business of operating a livestock sale or market unless duly licensed as hereinafter provided."

Section 277.020(3) defines the term "person" as "individuals, partnerships, corporations and associations."

Section 277.040, sub. 2, provides for the payment of an annual license fee of thirty-five dollars.

The seeming conflict arises from the provision of Section 274.180, RSMo 1969, which provides that non-profit cooperative marketing

Mr. Dexter D. Davis

associations organized under Chapter 274, RSMo, shall ". . . pay an annual fee of ten dollars only, in lieu of all franchise or license or corporation or other taxes, or taxes or charges upon reserves held by it for members."

The applicable standard to be applied when two statutes conflict and one must prevail is that, all else being equal, a special statute must take precedence over the general law; and, all else being equal, later statutes take precedence over earlier statutes. *Collins v. Twellman*, 126 S.W.2d 231, 233 (Mo. 1939). With this in mind, we note that the Missouri Livestock Marketing Law, Chapter 277, was enacted subsequent to the Cooperative Marketing Association Law, Chapter 274. See Laws 1943, Section 2, page 310 and Laws 1923, Section 30, page 111. Also, in two prior opinions issued from this office, we held that the Missouri Livestock Marketing Act has specific purposes, i.e., the prevention of the spread of livestock disease and the protection of those who use these livestock markets as outlets for the buying and selling of livestock. See Opinion No. 226 issued July 21, 1965, to Dr. George C. Stiles and Opinion Letter No. 259 issued June 30, 1971, to you (copies enclosed).

Under these circumstances, we are of the opinion that the subsequent special law governs and, therefore, a non-profit cooperative marketing association, organized under Chapter 274, operating a livestock sale or market as defined by Section 277.020(2), RSMo 1969, must be licensed under the provisions of Chapter 277, the Missouri Livestock Marketing Law.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 226
7-21-65, Stiles

Op. Ltr. No. 259
6-30-71, Davis

POLITICAL PARTIES:
PUBLIC EMPLOYEES:

Patronage employment within all
levels of government in the state
of Missouri is constitutionally

impermissible where any of the following conditions attach to such employment: (1) Any requirement that political party membership or approval be obtained before consideration is afforded applicants for patronage positions or to assure job security in patronage employment; and, (2) Any requirement that contributions of money, time or talent be made to a political party or personage before consideration is afforded applicants for patronage positions or to assure job security in patronage employment.

Likewise, any other form or manner of restriction or qualification placed on patronage employment would be constitutionally impermissible upon a determination by a court of law that it infringes or denies any of the following protected rights: (1) The First Amendment's guarantee of free speech and political association; (2) The Ninth Amendment's guarantee that allows one to engage in varying forms of political endorsements and activities to advance a particular view; (3) The Fourteenth Amendment's protection against infringement of the right to have an equal chance to attain elective office; and, (4) The Fourteenth Amendment's protection against infringement of the right to have an equally effective voice in the management of government.

OPINION NO. 250

October 16, 1972

Honorable A. Robert Pierce, Jr.
State Representative
225 North Clark
Cape Girardeau, Missouri



Dear Representative Pierce:

This opinion is in response to your request for an opinion on the following submitted question:

"Is patronage hiring which conditions employment with a governmental agency on varying forms of political allegiance to a party or personage Constitutionally permissible?"

This office interprets your question to be whether certain conditions, as below enumerated, can attach to patronage employment with governmental agencies within the state of Missouri or whether such conditions on employment are impermissible under

Honorable A. Robert Pierce, Jr.

the United States Constitution. Restrictions placed on public employment under patronage hiring practices, considered by this opinion, are the following:

- (1) The requirement that an applicant for a patronage position be associated with a particular political party before consideration is afforded that applicant for patronage employment;
- (2) The requirement that clearance be obtained from a political party or official before consideration is afforded that applicant for patronage employment; and,
- (3) The requirement that contributions of money, time or talent be made to a political party or personage or that membership be retained in a political party to assure job security as a patronage employee.

The conditioning of patronage employment by governmental employers within Missouri affects the following rights protected by the United States Constitution:

- (1) The right of free speech and association guaranteed under the First Amendment;
- (2) The right to vote, the right to seek public office and the right to associate with a candidate for public office as a worker or contributor thereof guaranteed under the Ninth Amendment; and,
- (3) The right to the equal protection of the laws and due process guaranteed under the Fourteenth Amendment.

Applicants for public employment in patronage positions and employees within a patronage office are directly affected by the conditioning of their employment, as above described. The United States Supreme Court has held that public employment cannot be denied a person or taken from him on impermissible constitutional grounds. This position was recently articulated in Perry v. Sindermann, 40 L.W. 5087 (June 29, 1972) wherein the United States Supreme Court stated:

"For at least a quarter century, this Court has made clear that even though a person has no

Honorable A. Robert Pierce, Jr.

'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' . . . Such interference with constitutional rights is impermissible.

"We have applied this general principle to denials of tax exemptions, . . . unemployment benefits, . . . and welfare payments, . . . But, most often, we have applied the principle to denials of public employment. . . . We have applied the principle regardless of the public employee's contractual or other claim to a job. . . ." (40 L.W. at 5088-5089)

The respondent in Perry was a nontenured college professor who under applicable regulations could be dismissed without cause except ". . . that the nonrenewal of a nontenured public school teacher's [employment] . . . may not be predicated on his exercise of First and Fourteenth Amendment rights. . . ." (40 L.W. at 5089). See also, Wieman v. Updegraff, 344 U.S. 183 (1952) and Freeman v. Gould Special School District, 405 F.2d 1153 (8th Cir. 1969), cert. den. 396 U.S. 843 (1969). A patronage employee is in the true sense a nontenured employee who under prevailing case law may be dismissed from public employment or not hired in the initial instance without any statement of cause. However, the failure to hire or the dismissal of that employee may not be based on impermissible constitutional grounds.¹

¹The Second Circuit Court of Appeals, in Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1970), cert. den. _____ U.S. _____, held that a patronage employee, dismissed from employment on the grounds of her failure to change party allegiance, was not afforded federal constitutional protection despite the employee's allegation that

Honorable A. Robert Pierce, Jr.

The right to engage in activities to further one's political views was held in United Public Workers of America v. Mitchell, 330 U.S. 75 (1947) to be reserved to the people by the Ninth and Tenth Amendments of the Federal Constitution. Also, the Supreme Court in Williams v. Rhodes, 393 U.S. 23 (1968) affirmed previous holdings that the First Amendment guaranteed the right of individuals to associate freely for the advancement of political beliefs.

Does patronage employment which conditions its hiring, as before described, infringe employees' or prospective employees' rights of free speech and political association and thereby deny such persons the equal protection of the laws? Whether such persons are denied the equal protection of the laws is to be determined by balancing the interests of the governmental body in the maintenance of a conditional patronage system against the interests of the employees to be free from official influence in their right to associate or advocate for the advancement of political ideas and beliefs. That is, whether the state or other public body can justify on a substantial and rational basis the necessity for maintaining a patronage system which conditions its employment on political affiliation or clearance and continuing contributions of money, time or talents.

Two functions are historically attributed to the necessity for maintaining patronage employment which conditions its hiring. They are:

¹cont'd
such action denied her the right of free political association.

In its decision the court held that ". . . the sole protection for government employees who have been dismissed for political reasons must be found in civil service statutes or regulations. . . ." (447 F.2d at 483). The court, however, in holding that it should ". . . not . . . be understood as saying, . . . that in all circumstances may a provisional employee be summarily discharged. . . ." (447 F.2d at 483) failed to elevate the right of political association to what the court considered as protected areas, i.e., ". . . reputation and . . . eligibility for other employment." ". . ." (447 F.2d at 483).

In light of the recent decisions of Perry v. Sindermann, supra, and the declaration in Williams, infra, that "the rights of individuals to associate for the advancement of political beliefs . . . [is] among our most precious freedoms," any credence to be afforded to the holding in Alomar is without support in law or logic.

Honorable A. Robert Pierce, Jr.

(1) Conditioned patronage employment is necessary to reward and thereby maintain countless party activities including the financing of the party and its candidates, for promoting intra-party cohesion and to attract voters and support for the party; and,

(2) Conditioned patronage employment is necessary to aid party responsibility and thereby control and effect public policy.

The fundamental and paramount importance afforded the rights of free speech and political association assume that these rights, recognized and protected by the Constitution of the United States, must prevail over extra-constitutional political traditions, that is, patronage employment which conditions its hiring.

Based upon the above authority, it is the opinion of this office that the prerequisite of party affiliation or clearance attaching to patronage employment places an impermissible constitutional restriction on a job applicant's right to seek a patronage position and an employee's right to job security. Likewise, any requirement making contributions of money, time, or talent a condition for continuing job tenure within patronage employment is constitutionally impermissible.²

Conditional patronage employment, furthermore, affects candidates who seek public office and voters, workers and contributors of such candidates. A recent decision by the Seventh Circuit Court of Appeals, *Shakman v. Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970) cert. den. 402 U.S. 909 (1971), supports a contention that conditional patronage employment denies to candidates, who are in opposition to other candidates endorsed by the administration controlling patronage employment, and voters, workers and contributors of the former candidates, the equal protection of the laws.

²This office does not interpret the opinion request as pertaining to bipartisan or nonpartisan boards or commissions within the state and such question is specifically reserved. However, it is the opinion of this office that a persuasive argument and rational basis can be advanced for upholding the validity of such boards or commissions against the charge of their invalidity under the equal protection clause of the United States Constitution.

Honorable A. Robert Pierce, Jr.

In Shakman, resident taxpayers challenged the patronage practices of the city of Chicago and Cook County. The federal district court in Shakman dismissed the complaint. The Seventh Circuit Court of Appeals reversed. The complaint, brought by two plaintiffs, one an independent candidate for election as a delegate to the Illinois Constitutional Convention, and the other his supporter, alleged that there were in Cook County between 8,000 and 30,000 Democratic patronage employees. It was alleged that these latter employees were hired by officials of the defendant organization upon the condition that their employment was to be reviewed periodically and that the employees, for job tenure, were expected to contribute money and then work for candidates endorsed by the Democratic County Organization. The plaintiff as a candidate and both plaintiffs as voters sought a declaration that this conduct violated the equal protection clause of the Fourteenth Amendment.

The court of appeals held that the interest of voters in an "equally effective voice" in the management of their government and the interest of a candidate to an "equal chance" in an electoral contest are entitled to constitutional protection from infringement resulting from the misuse of official power over patronage employees (435 F.2d at 270). Thus, the court impliedly held unconstitutional those aspects of the political patronage system which required city and county employees, as a condition of holding their jobs, to furnish votes, campaign for and contribute money to a party or candidate of the public official's choice (435 F.2d at 270-271).

In another case, White v. Snear, 313 F.Supp. 1100 (E.D.Pa. 1970), county commissioners in Pennsylvania required county employees on primary election day to electioneer for party-endorsed candidates. The employees were marked present at work, and were, therefore, paid by the state for their political activity. In its opinion, the court held:

"The effect of [the commissioners'] . . . conduct is to favor a certain segment of a political party and to perpetrate its power through an abuse of authority conferred upon [them] . . . by the state. By doing so, they discriminate against all other segments and candidates within that party. A clearer violation of the Equal Protection Clause would be difficult to imagine. . . ." (313 F.Supp. at 1104)

The court in Shakman was confronted with the question of whether the patronage system, as alleged, violated the plaintiff's rights to equal protection under the law. The court was confronted with

Honorable A. Robert Pierce, Jr.

balancing the interests between the maintenance of the patronage system there employed and the rights of the candidate, voter, worker and contributor to be free from such abuse of official authority. After acknowledging the equal protection clause as the basis for relief, if any, the court held:

" . . . The interest in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power over public employees so as to create a substantial, perhaps massive, political effort in favor of the ins and against the outs. We conclude that these interests are entitled to constitutional protection . . . " (435 F.2d at 270)

The court in Shakman found it unnecessary to engage in a discussion between the justification for patronage hiring which conditions its employment and the elimination of such a system. The fundamental and paramount importance given to the right to vote (Wesberry v. Sanders, 376 U.S. 1 (1964)), its corollary the right to seek public office (Williams, *supra*), and their collaterally associated activities (United Public Workers of America, *supra*), assumes that these rights, recognized and protected by the Constitution, must prevail over extra-constitutional political traditions, that is, patronage employment which conditions its hiring.

It is the opinion of this office, based upon the above authority, that the rights of candidates to an "equal chance" to elective office and the rights of voters, workers and contributors of candidates to an "equally effective voice" in the management of their government are infringed by the operation of conditional patronage employment within the state of Missouri.

CONCLUSION

It is the opinion of this office that patronage employment within all levels of government in the state of Missouri is constitutionally impermissible where any of the following conditions attach to such employment:

(1) Any requirement that political party membership or approval be obtained before consideration is afforded applicants for patronage positions or to assure job security in patronage employment; and,

(2) Any requirement that contributions of money, time or talent be made to a political party or personage before consideration is afforded applicants for patronage positions or to assure job security in patronage employment.

Honorable A. Robert Pierce, Jr.

Likewise, any other form or manner of restriction or qualification placed on patronage employment would be constitutionally impermissible upon a determination by a court of law that it infringes or denies any of the following protected rights:

(1) The First Amendment's guarantee of free speech and political association;

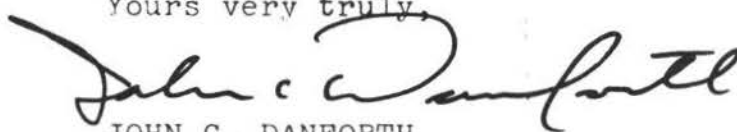
(2) The Ninth Amendment's guarantee that allows one to engage in varying forms of political endorsements and activities to advance a particular view;

(3) The Fourteenth Amendment's protection against infringement of the right to have an equal chance to attain elective office; and,

(4) The Fourteenth Amendment's protection against infringement of the right to have an equally effective voice in the management of government.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Kermit W. Almstedt.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large, sweeping initial "J".

JOHN C. DANFORTH
Attorney General

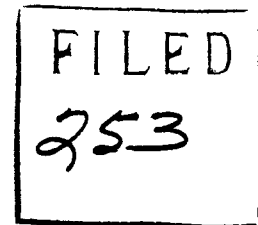
GOVERNOR:
CONSTITUTIONAL LAW:

The provisions of section 51, Article IV of the Missouri Constitution, requiring Senate confirmation of gubernatorial appointments, relates only to state executive branch officials.

OPINION NO. 253

September 12, 1972

Honorable Richard M. Webster
Missouri Senate
112 North Webb Street
Webb City, Missouri 64870



Dear Senator Webster:

This opinion is in response to your opinion request in which you ask for an interpretation of new constitution section 51, Article IV, Senate Committee Substitute for House Joint Resolution No. 65 of the 76th General Assembly, which states:

"The appointment of all members of administrative boards and commissions and of all department and division heads, as provided by law, shall be made by the governor. All members of administrative boards and commissions, all department and division heads and all other officials appointed by the governor shall be made only by and with the advice and consent of the senate. The authority to act of any person whose appointment requires the advice and consent of the senate shall commence, if the senate is in session, upon receiving the advice and consent of the senate. If the senate is not in session, the authority to act shall commence immediately upon appointment by the governor but shall terminate if the advice and consent of the senate is not given within thirty days after the senate has convened in regular or special session. If the senate fails to give its advice and consent to any appointee, that person shall not be reappointed by the governor to the same office or position."
(Emphasis added)

Honorable Richard M. Webster

In particular you inquire concerning the scope of the provision which we have underscored and whether or not the advice and consent of the Senate is required for the appointment of all officials throughout the state which the Governor may by law appoint initially or to fill vacancies in offices. Your question includes judicial offices of each category and level as well as county offices and notaries public.

A complete examination of the amendments to Article IV indicates that such amendments pertain only to the executive branch of the government. By section 12 of the amendment the executive department consists "of all state elective and appointive officials and employees except officials and employees of the legislative and judicial departments."

In this instance, in determining the intent of the people and the purpose for which the amendment was enacted, the doctrine of ejusdem generis should be applied. This rule of construction is stated in Hammett v. Kansas City, 173 S.W.2d 70, 75 (Mo. 1943), as follows:

" . . . 'The ejusdem generis rule is that where a statute contains general words only, such general words are to receive a general construction, but, where it enumerates particular classes or things, followed by general words, the general words so used will be applicable only to things of the same general character as those which are specified.' "

Applying this rule of construction to the provision in question, which we have underscored above, it is our view that the phrase "all other officials appointed by the governor" refers to those appointed by the Governor in the executive or the administrative branch of the government other than members of administrative boards and commissions and department and division heads. Obviously some officials of the executive department are not included within the officers described as members of administrative boards and commissions, department and division heads. For example, the counsel for the Public Service Commission is appointed by the Governor under the provisions of Section 386.070, RSMo 1969, and is not a member of an administrative board or commission or a department or division head but would be included by the general language including all other officials.

Thus, reading the provision in question in its complete context and attempting to ascertain the intent of the people in adopting the amendment, which we must do by the basic rules of

Honorable Richard M. Webster

constitutional construction, we arrive at the conclusion that the reference to "all other officials" was intended to include those the Governor could appoint in the executive or administrative branch of the government who are not expressly included in the precisely described listing of executive officials.

CONCLUSION

It is the opinion of this office that the provisions of section 51, Article IV of the Missouri Constitution, requiring Senate confirmation of gubernatorial appointments, relates only to state executive branch officials.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

ELECTIONS:
NEWSPAPERS:

A county clerk can publish notices
of primary and general elections
under Sections 120.400 and 120.580,

RSMo 1969, in any two newspapers published in the county when the
newspapers published in the county do not represent both of the
two major political parties.

OPINION NO. 254

October 17, 1972

Honorable A. J. Seier
Prosecuting Attorney
Cape Girardeau County
721 North Sunset
Cape Girardeau, Missouri 63701

Dear Mr. Seier:

The following opinion is issued in response to your request for an opinion as to whether a county clerk violates Missouri law if he publishes notices of the primary and general election in two independent newspapers in a county which does not have a newspaper representing the Republican party and another representing the Democratic party. In dealing with this question, we can only assume that the facts stated in your request are true, i.e., four newspapers are published in your county, two of which are independent and two of which are Republican in nature.

The applicable law in this matter is contained in Sections 120.400 and 120.580, RSMo 1969. Section 120.400 provides:

"Every publication required in connection with the conduct of a primary election shall be made in two newspapers which are published within the county, each of which represents one of the two major political parties, if there are two such newspapers, and if not, then in any two newspapers published within the county, or if there is only one newspaper published within the county then in that newspaper, or if there is no newspaper published within the county then in some newspaper having general circulation within the county."

Section 120.580 provides:

"At least seven days before an election to fill any public office, the clerk of the county court

Honorable A. J. Seier

of each county shall cause to be published in two newspapers representing each of the two major political parties, if such there be, and if not, then in two newspapers, or if there be only one newspaper published within the county then in such newspaper, the nominations to office certified to him by the secretary of state and also those filed in his office. He shall make two such publications in each of such newspapers before the election, one of which publications in each newspaper shall be upon the last day upon which such newspaper is issued before the election; provided, that no higher rates shall be paid per inch than is provided by section 493.030, RSMo."

These sections clearly place a duty upon the county clerk to publish his notices in two newspapers representing the views of the two major political parties when there are two such newspapers in his county. In our opinion, it is equally clear that the county clerk is under no duty to publish in any particular paper when the newspapers published in his county do not represent both of the two major political parties.

Therefore, in the factual situation mentioned in your request, the county clerk did not violate the provisions of Sections 120.400 or 120.580, RSMo 1969, by publishing the notice of the primary and general elections in two independent newspapers in the county. In the absence of a Democratic newspaper published in the county, he was free to publish the notices in any two of the four county newspapers.

CONCLUSION

It is, therefore, the opinion of this office that a county clerk can publish notices of primary and general elections under Sections 120.400 and 120.580, RSMo 1969, in any two newspapers published in the county when the newspapers published in the county do not represent both of the two major political parties.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard L. Wieler.

Yours very truly,



JOHN C. DANFORTH
Attorney General

LIBRARIES:
NEPOTISM:
COUNTY LIBRARIES:

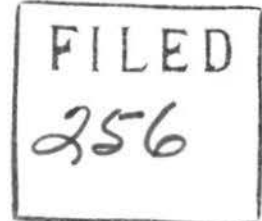
A judge of the county court violates the prohibition of nepotism contained in Article VII, Section 6 of the Missouri Constitution if

he participates in the appointment of a relative within the fourth degree of consanguinity to the board of trustees of the county library district.

OPINION NO. 256

November 1, 1972

Mr. Charles O'Halloran
State Librarian
Missouri State Library
308 East High Street
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This is in response to your request for an opinion on the following question:

"Article 7, Section 6, of the State Constitution provides that no public officer or employee in this state shall name or appoint to public office or employment any relative, and provides a penalty if such appointment or employment should take place.

"Section 182.050, RSMo, provides that the county court of a county shall appoint the members of the county library board.

"If a county court should appoint to the county library board an individual who is related by consanguinity or affinity to a member of the county court, does Article 7, Section 6, of the Constitution apply? Is membership on a county library board a 'public office' in the sense intended in the Constitution?"

Article VII, Section 6 of the Missouri Constitution provides:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

Mr. Charles O'Halloran

In State ex inf. McKittrick v. Whittle, 63 S.W.2d 100 (Mo. Banc 1933), the Supreme Court held that a director of the school district occupies a public office. In so doing, the court stated, l.c. 102:

"A public office is defined to be "the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." Mechem, Pub. Off. 1. . . ."

Article IX, Section 10 provides:

"It is hereby declared to be the policy of the state to promote the establishment and development of free public libraries and to accept the obligation of their support by the state and its subdivisions and municipalities in such manner as may be provided by law. When any such subdivision or municipality supports a free library, the general assembly shall grant aid to such public library in such manner and in such amounts as may be provided by law."

Therefore, in Missouri, operation and maintenance of free public libraries is a sovereign function of government.

In carrying out the policy of the state of Missouri to promote free public libraries, the legislature in Sections 182.010 through 182.160, RSMo 1969, has provided for county libraries. The board of trustees of a county library is charged under Section 182.060 to carry out the intent of Sections 182.010 to 182.120 in establishing and maintaining free county libraries. Therefore, a member of the board of trustees of the county library would hold a public office.

Since a member of the board of trustees holds a public office, the appointment of the member is subject to the prohibition against nepotism contained in Article VII, Section 6. The cases of State ex inf. McKittrick v. Whittle, supra, and State ex rel. McKittrick v. Becker, 81 S.W.2d 948 (Mo. Banc 1935), hold that the nepotism prohibition applies to appointments to public office made by boards or other multi-member bodies as well as by individuals. In the Whittle case, the court noted, l.c. 101-102:

Mr. Charles O'Halloran

"Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment [prohibiting nepotism]. . . ."


However, the Becker case recognizes that there may be an appointment of a relative of one of the members of the appointing body, if it is possible for that appointment to be made without the participation of the member. Therefore, it is possible for a county court to appoint a person to a library board of trustees who is a relative within the fourth degree of one of the judges of the county court if that particular judge abstains from participating in the decision to appoint his relative and the appointment is not the result of collusion or connivance with the abstaining judge.

CONCLUSION

It is, therefore, the opinion of this office that a judge of the county court violates the prohibition of nepotism contained in Article VII, Section 6 of the Missouri Constitution if he participates in the appointment of a relative within the fourth degree of consanguinity to the board of trustees of the county library district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles A. Blackmar.

Very truly yours,



JOHN C. DANFORTH
Attorney General

LIBRARIES:
CITY LIBRARIES:
COUNTY LIBRARIES:

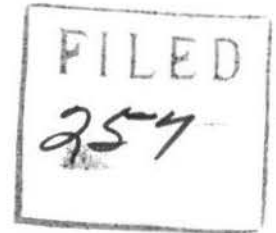
With respect to city-county library districts under the provisions of Section 182.291 (Senate Bill No. 583, 76th General Assembly, Second

Regular Session): (1) "Fiscal year" as used in subsection 5 with respect to the merger for tax purposes refers to the tax year of the city; (2) The county library district fiscal year is the applicable fiscal year after the district is established; (3) Where the city and the county have the same name, it need not be repeated to properly identify the district and it is sufficient if the name is stated once identifying the district as a city-county library district.

OPINION NO. 257

December 22, 1972

Mr. Charles O'Halloran
State Librarian
Missouri State Library
308 East High Street
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This opinion is in response to your request asking certain questions with respect to Section 182.291 (Senate Bill No. 583, 76th General Assembly, Second Regular Session) relating to city-county library districts.

Subsection 5 of Section 182.291, which is relevant to your inquiry, provides:

"5. For all tax purposes, including levies and adjustments thereof, the city library district shall become a part of the county library district at the beginning of the next fiscal year after the merger and the property within the city library district shall be treated as within the county library district for all such purposes; except, until the city library district shall become a part of the county library district the levy and collection of taxes shall be made as though no merger had taken place, so that the levy and collection of taxes shall be without interruption, and during that period no change in the levy shall take place. The funds collected shall be turned over to the city treasurer immediately upon collection." (emphasis added)

Mr. Charles O'Halloran

Your first question asks the meaning of "fiscal year" as used in subsection 5, and underscored above. The use of the phrase "all tax purposes" makes it clear that the meaning of "fiscal year" as such term is used in that subsection is a tax year because the subsection states that the collection of taxes shall be made as though no merger had taken place. Such provision also makes it clear that the tax year referred to is the city tax year because the reference to the collection of taxes as if the merger had not taken place obviously refers to the collection of city taxes. It is, therefore, our view that the reference to "fiscal year" in such subsection means the tax year of the city, that is, the year in which property is assessed, the rate of levy fixed and in which such annual taxes are due and payable.

Your second question asks which fiscal year the library district is to follow if the city and county have different fiscal years. Since subsection 5 above provides that the "city library district shall become a part of the county library district" for tax purposes and subsection 7 of Section 182.291 with certain exceptions gives the new district the "rights, powers, responsibilities, and privileges granted county library districts," the county library district fiscal year is the applicable fiscal year.

Your third question asks whether the name of the city and the name of the county must be repeated in the official name of the merged district when the name is the same for both.

Subsection 6 of Section 182.291 provides in part:

" . . . the merged city-county library district,
 . . . shall have an official name composed of
 the name of the city, followed by the name of
 the county and followed by the words 'county
 library district'."

It is our view that when the name of the city and the name of the county are the same the statute does not require repetition and there is sufficient compliance with the statute if the city-county library district is designated as the (Name) City and County Library District.

CONCLUSION

It is the opinion of this office with respect to city-county library districts under the provisions of Section 182.291 (Senate Bill No. 583, 76th General Assembly, Second Regular Session) that:

(1) "Fiscal year" as used in subsection 5 with respect to the merger for tax purposes refers to the tax year of the city.

Mr. Charles O'Halloran

(2) The county library district fiscal year is the applicable fiscal year after the district is established.

(3) Where the city and the county have the same name, it need not be repeated to properly identify the district and it is sufficient if the name is stated once identifying the district as a city-county library district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

October 2, 1972

OPINION LETTER NO. 258
Answer by letter-Wieler

Honorable William E. Robinson
State Treasurer
Capitol Building, Room 229
Jefferson City, Missouri 65101



Dear Mr. Robinson:

This letter is issued in response to your request for an opinion concerning the legality of accepting "book-entry treasury securities" as evidence of a United States government obligation rather than bonds, notes or certificates of indebtedness.

Section 30.260, sub. 2, RSMo 1969, allows the State Treasurer to use state moneys not needed for current operations of the state government for the purchase of short term United States government obligations maturing and becoming payable one year or less from the date of issue or other United States government obligations maturing and becoming payable not more than one year from the date of purchase, as the Treasurer in the exercise of his best judgment deems to be in the best overall interest of the people of the state of Missouri.

Subsection 4 of Section 30.260 provides that:

"The state treasurer may subscribe for or purchase obligations of the United States government of the character described in subsection 2 of this section which he, in the exercise of his best judgment, believes to be the best for investment of state moneys at the time and which are available to him at a price not in excess of par plus interest accrued to the date of purchase, and in payment therefor may withdraw moneys from any bank account, demand

Honorable William E. Robinson

or time, maintained by him without having any supporting warrant of the state auditor. The state treasurer may bid on subscriptions for such obligations in accordance with his best judgment. The state treasurer shall provide for the safekeeping of all such obligations so acquired in the same manner that securities pledged to secure the repayment of state moneys deposited in banking institutions are kept by him pursuant to law. The state treasurer may hold any such obligation so acquired by him until its maturity or prior thereto may sell the same as he, in the exercise of his best judgment, deems necessary or advisable for the best interest of the people of the state of Missouri in the light of the circumstances at the time prevailing. The state treasurer may pay all costs and expenses reasonably incurred by him in connection with the subscription, purchase, sale, collection, safekeeping or delivery of all such obligations at any time acquired by him."

In Subpart O of the Treasury Department's Circular No. 300, Third Revision, dated December 23, 1964, as amended and supplemented (31 C.F.R. Part 306), the United States Department of the Treasury has defined a "treasury security" as a ". . . Treasury bond, note, certificate of indebtedness, or bill issued under the Second Liberty Bond Act, as amended, in the form of a definitive Treasury security or a book-entry Treasury security." A "definitive treasury security" is defined as a ". . . Treasury bond, note, certificate of indebtedness, or bill issued under the Second Liberty Bond Act, as amended, in engraved or printed form." A "book-entry treasury security" is defined as a treasury bond, note, certificate of indebtedness, or bill issued under the Second Liberty Bond Act, as amended, in the form of an entry made as prescribed in Subpart O on the records of a reserve bank.

What is involved then is simply another method of evidencing a United States government obligation. In our opinion, subsections 2 and 4 of Section 30.260 do not require the Treasurer to seek an actual bond as evidence of an obligation against the United States government. If a "book-entry treasury security" is sufficient to bind the United States government, it can be accepted by the Treasurer as evidence of an obligation purchased with state moneys not needed for current operating expenses.

These "book-entry treasury securities" should be kept by the State Treasurer in the same manner that securities pledged to secure

Honorable William E. Robinson

the repayment of state moneys deposited in banking institutions are kept by him pursuant to law, i.e., in the vaults of the state treasury or in the vaults of the banks or trust companies or other safe depository that the Governor, State Auditor and Treasurer agree upon. Section 30.270, subsection 2, RSMo 1969.

Yours very truly,

JOHN C. DANFORTH
Attorney General

ELECTIONS:
ABSENTEE VOTING:
NOTARY PUBLIC:

A notary public or other officer acknowledging absentee ballot affidavits is prohibited from assisting persons in marking absentee ballots and from receiving compensation for acknowledging absentee ballot affidavits.

OPINION NO. 262

October 20, 1972

Honorable W. Clifton Banta, Jr.
Prosecuting Attorney
Mississippi County
Post Office Box 469
Charleston, Missouri 63834



Dear Mr. Banta:

This opinion is in response to your request in which you ask:

"Can a Notary Public or other officer assist or aid an illiterate or blind person in reading and marking an absentee ballot under the provisions of Section 112.050, Revised Statutes of Missouri?

"Can a Notary Public or other officer authorized to accept absentee ballots under Section 112.050, Revised Statutes of Missouri, accept a fee from a candidate or political committee or organization for going from house to house to persons who have applied for an absentee ballot and Notarizing these ballots?"

Section 112.050 to which you refer as amended by the 76th General Assembly, Second Regular Session, Senate Bill No. 461, provides:

"The absentee voter shall make and subscribe to the affidavits provided for on the return envelope before any officer authorized by law to administer oaths. The voter shall exhibit the ballot to the officer unmarked, and shall in the presence of the officer and of no other person mark the ballot in such manner that

the officer cannot see or know how it is marked.
The ballot shall then in the presence of the officer be deposited in the envelope and the envelope securely sealed. The officer shall then write or print upon the envelope the following: 'Absentee ballot of (insert name of voter) marked and sealed in my presence', which certificate shall be signed by the officer and his official title noted thereon. The envelope shall be sent by mail by the voter, postage prepaid, to the election authority, or may be delivered in person by the voter to the issuing official, who shall give his receipt therefor. For the ballot to be eligible to be counted the envelope containing it shall be received by the election authority not later than four p.m. of the day before the election with the exception of absentee ballots for president and vice president which shall be received not later than the time for closing of the polls. No charge shall be made by any officer in this state for the acknowledgment of affidavits prescribed in this chapter." (Emphasis added)

The affidavits referred to in Section 112.050, now set out in Section 112.040, as amended by the 76th General Assembly, House Bill No. 1167, provide in part:

"I further swear that I marked the enclosed ballot in secret, . . .

"Subscribed and sworn to before me, an officer duly authorized under the laws of this state to administer oaths, this _____ day of _____, A.D. _____, and I hereby certify that the affiant has exhibited the enclosed ballot to me unmarked, and that he then in my presence, and in the presence of no other person and in such manner that I could not see his vote, marked such ballot and enclosed and sealed same in this envelope without my seeing or knowing his vote, and that the affiant was not solicited or advised by me to vote for or against any candidate or proposition." (Emphasis added)

In answer to your first question which asks whether the notary public or other officer can assist the absentee voter in marking

Honorable W. Clifton Banta, Jr.

his ballot, we enclose our Opinion No. 283, 1972 to Beckerle which holds that the notary or other officer cannot mark the ballot for the voter or know how such vote was cast. Such opinion also states our view respecting how such voters who need assistance may be helped in marking the ballot.

In answer to your second question respecting whether a notary public or other officer authorized to acknowledge such affidavits may receive a fee from a candidate or political committee or organization for going from house to house and acknowledging such ballot affidavits, we call your attention to the last sentence in Section 112.050, to wit:

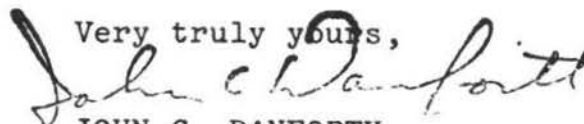
" . . . No charge shall be made by any officer in this state for the acknowledgment of affidavits prescribed in this chapter."

In New v. Corrough, 370 S.W.2d 323 (1963) the Supreme Court of Missouri held that one reason for this provision was to protect the voter against being charged a fee for the privilege of casting his ballot and that, in that instance, the vote would be counted despite the fact that the evidence showed that the notary accepted a fee from a third party after the services were rendered. We find no other cases respecting this provision and we do not view the Corrough case as limiting the prohibition to cases where the voter is charged or makes the payment. That is, the language of the statute is strict and concise. No charge shall be made by such officer. In the situation you set out the notary is hired by certain persons to acknowledge such affidavits. In our view this is a violation of the provisions of Section 112.050 which prohibits such an officer from charging for such services.

CONCLUSION

It is the opinion of this office that a notary public or other officer acknowledging absentee ballot affidavits is prohibited from assisting persons in marking absentee ballots and from receiving compensation for acknowledging absentee ballot affidavits.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 283-1972, Beckerle

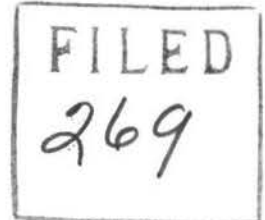
SCHOOLS:
TUITION:

Article IX, Section 1(a), of the Missouri Constitution of 1945 forbids a school district from charging any fee to any resident student who wishes to enroll in any course offered for academic credit.

OPINION NO. 269

December 1, 1972

Honorable Joseph W. Hill
State Representative
1438 East 78th Street
Kansas City, Missouri 64131



Dear Representative Hill:

This opinion is in response to your request for a ruling on the following question:

"Is it legal for a six-member public school board to charge a \$35.00 fee per student to take an automobile driver's training course?"

The facts as they appear in your request are that a school district offers an optional driver's training course as a part of its high school curriculum. Academic credit is given for the course, and a \$35.00 fee is required. We understand that the amount of the fee is not related to the cost of operating the course.

Every Constitution of the state of Missouri since 1865 has included provisions for free public schools. The current requirement appears in Article IX, Section 1(a) of the present Constitution which states, in relevant part, the following:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. . . ."

Pursuant to this constitutional mandate the legislature has provided for free schools in one of the opening sections of the Missouri School Laws, Section 160.051, RSMo 1969, which reads, in relevant part, as follows:

Honorable Joseph W. Hill

"A system of free public schools is established throughout the state for the gratuitous instruction of persons between the ages of six and twenty years. . . ."

Thus, both the people of Missouri in enacting the Constitution, and the legislature of Missouri in implementing the Constitution, have required the public schools of Missouri to be free and have required that they provide gratuitous instruction for all persons between certain ages.*

In interpreting a constitutional provision like this, we are bound by the natural and plain meanings of the words involved. State ex rel. Heimberger v. Board of Curators of University of Missouri, 188 S.W. 128 (Mo. Banc 1916). Webster's Third New International Dictionary defines "free" as meaning "not costing or charging anything; given or furnished without cost or payment" and gives as an example "a free school." "Gratuitous" is defined in the same dictionary as meaning "costing the recipient or participant nothing: free." The fact that the Constitution of Missouri contains not one but both of these terms requires the conclusion that the Constitution prohibits Missouri schools from charging their pupils anything for the privilege of taking courses offered by those schools.

There is another meaning of "free" which might apply to public schools. This is that the schools shall be open to all students without regard to their background or to the wealth of their parents. See Speeches of Delegates Fyan and Norton, IX Debates of Missouri Constitutional Convention of 1875 (1942 Ed.), at 66, 72. However, schools cannot be said to be genuinely "free" to all in this sense if there are admission fees to some courses. A fee has the effect of denying to some students on the basis of wealth the ability to take a course. It was no doubt recognition of this circumstance that led Mr. Fyan, in the speech cited above, to include as a second part of his definition, the requirement that the schools be supported at public expense. Further, the added requirement in the Constitution for "gratuitous instruction" would seem to confirm that the delegates wanted "free" to mean both "open" and "without cost."

There is considerable judicial support for the proposition that a constitutional provision for free public schools does not

*This opinion is not concerned in any way with charges for tuition made to students who are not residents of the school district involved.

Honorable Joseph W. Hill

permit the imposition of school fees. The general rule is that a requirement for free schools will invalidate any fee, whether denominated tuition, matriculation fee, registration fee, library fee, incidental fee, or anything else. See State ex rel. Roberts v. Wilson, 297 S.W. 419 (Spr.Ct.App. 1927), and cases collected at Anno., Validity of Public School Fees, 41 A.L.R.3d 752. Fees have been allowed only in states with significantly different constitutional or statutory provisions. See, e.g., Vincent v. County Board of Education of Talladega County, 131 So. 893 (Ala. 1931) (constitutional provision for "liberal system of public schools"); Felder v. Johnston, 121 S.E. 54 (S.C. 1924) (statutory authority for fees).

In recent years, two leading cases have affirmed and amplified the view that free schools may not require fees. In the first case, the Idaho state supreme court interpreted a constitutional requirement of "public, free common schools" to forbid any required fees, even those charged for the school activity ticket, newspaper and yearbook. Paulson v. Minidoka County School District No. 331, 463 P.2d 935 (Idaho 1970). The second case went further and interpreted a constitutional requirement for "free public elementary and secondary schools" as not only prohibiting any fees charges by the school, but also imposing an affirmative duty on school districts to supply all school supplies to students without cost. Bond v. Public Schools of Ann Arbor School District, 178 N.W.2d 484, 41 A.L.R.3d 742 (Mich. 1970). Neither of these states had in its constitution the double requirement of "free public schools" and "gratuitous instruction" that appears in Missouri, yet both found all fees required of students to be unconstitutional.

This office issued a related opinion to Donald J. Gralike, No. 206, dated October 23, 1969, in which we stated that a school may not penalize or punish in any way a student who does not furnish materials required in a course. Since not having supplies or books that have been required and therefore being unable to participate fully in daily class exercises is itself a form of penalty, that prior opinion is applicable in principle here. However, since much of Opinion No. 206-1969 deals with a statute (§170.051, RSMo 1969) which has since been repealed, that opinion is hereby withdrawn.

It could be argued that since driver's training is not a required course in the school district involved, a fee for this course might properly be charged. The Missouri Constitution, however, makes no such distinction between courses which are required of all students and those which are not. In the 1875 Constitutional Convention, the last time the concept of free schools was seriously challenged in Missouri, one delegate offered an amendment which would

Honorable Joseph W. Hill

have limited gratuitous instruction to the subjects of spelling, reading, writing, arithmetic, grammar, geography, and American history; the delegates rejected this amendment and chose instead the language which still appears in the Missouri Constitution. II Journal of the Missouri Constitutional Convention of 1875 (1920 Ed.) 580-582. Since 1875, elective courses have become an integral part of Missouri education, and the State Board of Education currently requires at least six units of electives (which may include credit for driver's education) to be successfully completed before a student may be graduated. The School Administrators Handbook (Missouri State Board of Education, 1969 Ed.), pp. 116-119. On the question of fees, we can see no legal basis for distinguishing between any courses, required or elective, for which credit is given towards graduation.


It is also noted in the facts that the \$35.00 fee might not be related to the actual cost of giving the course. This fact, however, is not necessary for the conclusion reached here. Even a fee used solely to reimburse the actual cost of teaching the course would not be permissible under the Constitution and statutes of Missouri. Every course offered by a school costs that school money. A driver's education course requires the purchase of gasoline, but similarly, a chemistry course needs chemicals, a physics laboratory uses electricity, a secretarial course requires typewriter ribbons and carbon paper, a shop course requires both tools and supplies for the students to use, and even an American history course requires chalk and the customary map showing the territorial expansion of the United States. Each of these is a cost that the school would not incur if the course were not given, but such costs are merely part of the expenses of running a school, and stand on the same legal basis as maintenance and teachers' salaries, insofar as fees are concerned. There is no authority in the Constitution or statutes for allowing any of these costs to excuse the school district from its duty of providing "gratuitous instruction" to all students who are properly enrolled in its schools.

CONCLUSION

Therefore, it is the opinion of this office that Article IX, Section 1(a), of the Constitution of Missouri of 1945 forbids a school district from charging any fee to any resident student who wishes to enroll in any course offered for academic credit.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Yours very truly,



JOHN C. DANFORTH
Attorney General

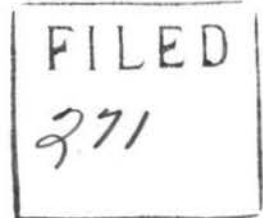
CHARTER COUNTIES:
COUNTIES:
POLICE:
CONSTITUTIONAL LAW:

Neither the regular police officers of the Police Department of the City of St. Louis nor the reserve officers of such city appointed under the provisions of Section 84.175, RSMo (House Bill No. 1144, 76th General Assembly, Second Regular Session) are under the provisions of Section 66.250, RSMo (Senate Bill No. 389, 76th General Assembly, Second Regular Session) requiring certain training or experience of police officers in police departments in any county of the first class having a charter form of government.

OPINION NO. 271

October 6, 1972

Mr. Richard M. Miller, Secretary
Board of Police Commissioners
City of St. Louis
1200 Clark Avenue
St. Louis, Missouri 63130



Dear Mr. Miller:

This opinion is in answer to your question in which you ask:

"Are members of the police reserve force, as authorized by Section 84.175 RSMo., subject to the minimum training provisions of Section 66.250.?"

Section 84.175, as newly enacted by House Bill No. 1144 of the 76th General Assembly, Second Regular Session, provides:

"1. Upon recommendation of the chief of police, the board may authorize and provide for the organization of a police reserve force composed of residents of the city who qualify under the provisions of section 84.120. Such reserve force shall be under the command of the chief of police and shall be provided training, equipment, uniforms, and arms as the chief shall direct with the approval of the board; and when assigned to active duty the members of the reserve force shall possess all of the powers of regular police officers and shall be subject to all laws and regulations applicable to police officers; provided, however, that the city council or other governing body of any such city may in

Mr. Richard M. Miller

its discretion fix a total in number which the reserve force may not exceed.

"2. In event of riot or other emergencies as declared and defined by the mayor, in concurrence with the board, the board, upon recommendation of the chief, may appoint special officers or patrolmen for temporary service in addition to the police reserve force herein provided for, but the length of time for which such officers or patrolmen shall be employed shall be limited to the time during which such emergency shall exist."

Section 66.250, RSMo, to which you refer, as amended by Senate Bill No. 389, 76th General Assembly, Second Regular Session, provides:

"1. Any person appointed after September 28, 1971, to serve as a police officer in any police department in any county of the first class having a charter form of government shall, if he has not heretofore completed the training required by this subsection, within six months from the date of the appointment, cause to be filed with the prosecuting attorney of the county proof that he has satisfactorily completed a law enforcement officer training course conducted by the Federal Bureau of Investigation National Academy or the Southern Police Institute of Louisville, Kentucky, or a training course with a minimum of six hundred hours of instruction conducted by the county police department alone or in cooperation with any municipal police department authorized by law to operate police training courses, the state highway patrol, or any accredited course for police officers approved by such county police department; provided that any person who has successfully completed a basic police recruit training course conducted by the St. Louis County and Municipal Police Training Academy, the City of St. Louis Police Academy or the Kansas City Police Academy, or who has eight continuous years' of service and experience as a full-time police officer, shall have fulfilled the requirements of this law.

Mr. Richard M. Miller

"2. Any person so appointed who fails to comply with the provisions of this section within the six months' period shall not thereafter receive any compensation nor shall he be authorized to act as a police officer until he has complied.

"3. The chief executive officer of each police department shall be responsible for the enforcement of this section, and shall notify the prosecuting attorney of the county of the appointment of any new officer not later than five days after the date of the appointment.

"4. Any person who willfully violates any of the provisions of this section is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law."

In our view the question can be resolved simply by determining whether the Police Department of the City of St. Louis falls within the provisions of Section 66.250 because if Section 66.250 does not apply to the regular police officers of the city it follows that it does not apply to such reserve officers.

In this respect we note that such section refers to "any police department in any county of the first class having a charter form of government." The City of St. Louis is recognized as a county under section 31 of Article VI of the Missouri Constitution and Section 1.080, RSMo 1969 provides that the word "county" in any law general in its character to the whole state includes the City of St. Louis unless the construction is inconsistent with the intent of the law.

However the usual procedure that the legislature follows in including the City of St. Louis in the provisions of a law is to refer to "constitutional charter cities in this state not situated within a county", Section 137.485, RSMo 1969, or "to cities of this state now having, or which hereafter have, six hundred thousand inhabitants, or more", Section 118.020, RSMo 1969, or "all cities of this state that now have, or may hereafter attain, a population of seven hundred thousand inhabitants or over", Section 84.010, RSMo 1969, or "a city not located in a county", Section 1.100, RSMo Supp. 1971.

Further in this respect it has been held that the City of St. Louis is not legislatively classified as a county but as a city and that the provisions in the Missouri Constitution applicable to a county charter form of government do not apply to the City of St. Louis. Stemmler v. Einstein, 297 S.W.2d 467, 469, 474 (Mo. 1957).

Mr. Richard M. Miller

We conclude that the City of St. Louis is not a charter county within Section 66.250 and that the police force of the city is not within the training or experience requirements of such section.

CONCLUSION

It is the opinion of this office that neither the regular police officers of the Police Department of the City of St. Louis nor the reserve officers of such city appointed under the provisions of Section 84.175, RSMo (House Bill No. 1144, 76th General Assembly, Second Regular Session) are under the provisions of Section 66.250, RSMo (Senate Bill No. 389, 76th General Assembly, Second Regular Session) requiring certain training or experience of police officers in police departments in any county of the first class having a charter form of government.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

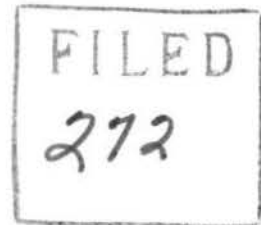
A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a more compact, flowing style.

JOHN C. DANFORTH
Attorney General

December 11, 1972

OPINION LETTER NO. 272
Answer by Letter - Boicourt

Honorable J. William Holliday
Prosecuting Attorney
Clark County
Post Office Box 140
Kahoka, Missouri 63445



Dear Mr. Holliday:

This letter is in response to your request for an official opinion from the Office of the Attorney General concerning the following question:

"Is it a violation of Section 463.070, RSMo, 1969, for a funeral home to enter into a prearranged funeral plan with a Missouri resident which provides for the individual to deed real property to the owner of the funeral home, the individual retaining life estate, as consideration for the funeral arrangement agreement."

Chapter 436, RSMo 1969, deals with one type of special purpose contract, i.e., prearranged funeral agreements. This chapter was enacted into law by the Missouri Legislature in 1965. The title of the act is "An Act relating to the sale of personal property or services under prearranged funeral agreements, contracts or plans, regulating the disposition and handling of moneys paid thereunder, and providing penalties for the violation thereof." Section 436.010, RSMo 1969, defines the type of contract meant to be regulated as:

"Any agreement, contract or plan requiring the payment of money by a purchaser in a lump sum or in installments, which is made or entered into with any person, association,

Honorable J. William Holliday

partnership, firm or corporation who, in consideration thereof, agrees to provide for the final disposition of a dead human body, or for funeral or burial services, or for services to be rendered in negotiating such arrangements or providing for discounts with respect thereto, or for the furnishing of personal property or funeral or burial merchandise, wherein the delivery of the personal property or the funeral or burial merchandise and services in connection with the negotiation of such arrangements, allowance of discounts, or the furnishing of professional services by a funeral director or embalmer, is not immediately required, . . ."

Any such prearranged funeral agreement must be represented by a written memorandum consistent with the provisions of Chapter 436. The remainder of that chapter provides for the disposition and handling of moneys paid under such an agreement. Section 436.020 requires moneys paid under such an agreement to be deposited with certain enumerated banking institutions and provides the disposition of income earned on such moneys deposited. Section 436.030 provides that moneys so deposited must be held by a banking institution, the account to be in the name of the seller and purchaser involved in the agreement, until at least five days after the death of the purchaser and provides for the withdrawal of the money so held by the seller upon his having rendered the services or merchandise contracted for. Section 436.040 requires that in the event the money is not deposited in accordance with Section 436.030, the seller may retain a portion of money paid under the agreement (up to twenty percent of the total agreed to) and that the remainder of the money so paid shall be held in trust for the duration of the life of the purchaser. Section 436.050 sets forth the duties for the seller in the event that the purchaser dies in an area removed from the locale of the seller. Section 436.060 makes provision for the cancellation of the contract. Section 436.070, the section mentioned in your opinion request, makes the violation of Chapter 436 a misdemeanor. Section 436.080 provides that violations of the chapter may be enjoined.

We believe that it is apparent from the clear language of Chapter 436 that a prearranged funeral plan in which the purchaser conveys real property to the seller, a funeral director, and retains a life estate in that real property is not governed by any provision of the chapter in question. Chapter 436 concerns only "Any agreement, contract or plan requiring the payment of money. . . ." (Emphasis added). That chapter provides

Honorable J. William Holliday

for the disposition or handling of moneys paid under such agreements. It does not expressly apply to agreements wherein the consideration is real estate, the life estate in which is retained by the purchaser. Therefore, the penalty provisions of Section 436.070, RSMo 1969, do not apply to such an agreement because the handling or disposition of moneys is not involved.

You have enclosed a copy of an agreement between the funeral home and Bessie Reba, part of which is illegible, which states that there was paid to the funeral home \$992.80 and which further states that the funeral home will return money paid under certain circumstances. We have in writing this opinion letter not considered the question whether the agreement you enclosed actually states the true facts as to the transaction but have written the opinion letter based on the specific facts in the request.

The opinion expressed is a response only to the narrow question raised by your opinion request. We express no opinion as regards the validity or legality of the particular arrangement which you set forth in your request as it might be affected by other laws of this state.

Very truly yours,

JOHN C. DANFORTH
Attorney General

ELECTIONS:
COUNTY CLERKS:
REGISTRATION:
HOLIDAYS:

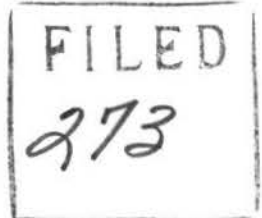
The Missouri statutes with respect to the close of voter registration which provide for different closing dates for such registration are valid.

The General Assembly of Missouri can by statutory enactment provide for a uniform closing date for registration throughout the state. County clerks are not prohibited from opening their offices for registration on a legal holiday under Sections 114.080 or 116.030, RSMo 1969.

OPINION NO. 273

October 4, 1972

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This opinion is in response to your question in which you ask:

"May the county clerks of the various counties of the State of Missouri which have voter registration register voters on October 10, 1972."

You also state:

"Confusion has resulted because of an ambiguous statutory requirement regarding voter registration.

"Section 114.120 provides 'no person is entitled to register within a period of 28 days prior to any primary or general election . . .'

"Section 116.030 provides that 'no person shall be entitled to register within a period of 28 days prior to any election . . .'

"Section 113.210-3 provides '. . . no new registration of voters . . . shall be made at any time later than 5 p.m. on the 28th day preceding any general, special or primary election . . .' (1971 Supp.).

Honorable James C. Kirkpatrick

"The effect of the latter requirement, enacted by House Bill 150, laws 1971, is to impose a different requirement upon Boards of Election Commissioners than is imposed upon the urban counties adjacent to the metropolitan areas which have voter registration. For instance, it means that the last date for voter registration in St. Charles County will be October 7, 1972, while the last day for voter registration in adjoining St. Louis County will be October 10.

"It seems that the intent of the legislature was to provide uniformity in voter registration throughout the state, and thus your interpretation of this ambiguity is requested so as to clarify the situation."

In addition to the differences in the registration statutes that you have noted above there are also other statutory variations. That is, Section 118.240, RSMo Supp. 1971 with respect to registration of voters in cities of over 600,000 inhabitants (St. Louis City), provides in part:

". . . Registration for any election shall be closed at five o'clock p.m. on the twenty-eighth day preceding the election, . . ."

Further, Section 117.290, RSMo 1969 with respect to cities having 300,000 to 700,000 inhabitants (Kansas City), provides in part:

". . . Registration for any election shall be closed at the close of office hours on the fourth Wednesday prior to the day of the election, . . ."

And, Section 119.280, RSMo 1969 with respect to certain counties containing a city or part of a city of over 400,000 inhabitants (Clay County), provides in part:

"No registration of new voters for any election shall be permitted later than the fourth Wednesday before the election in counties included in this chapter, . . ."

Thus, it is clear that the registration laws of this state are not consistent. However it cannot be said that such laws are, in this respect, ambiguous and where a statute is not ambiguous

Honorable James C. Kirkpatrick

there is no room for construction, the intent is clear and we cannot search for a meaning beyond the statute itself. State ex rel. Bell v. Phillips Petroleum Company, 160 S.W.2d 764 (Mo. 1942). Therefore the rule of construction applied in this instance simply means that even though the precise language of the statutes results in different closing registration dates there is no way for this office to achieve uniformity by construction.

We do not consider whether there is any constitutional violation by reason of the differences in the closing registration dates. We see no clear constitutional violation and it is a well settled principle of constitutional construction that only when there is a clear conflict between a legislative enactment and the Constitution are the courts warranted in declaring the law to be void. In the Matter of Burris, 66 Mo. 442, 450 (1877); Borden Company v. Thomason, 353 S.W.2d 735, 743 (Mo. 1962). If uniformity is sought, recourse is to the state legislature.

You also ask inferentially whether county clerks of counties having local option registration under Chapter 114, RSMo and county clerks in certain counties containing cities of over 10,000 inhabitants under Chapter 116, RSMo may open their offices for registration on the second Monday in October (October 9, 1972) which is a public holiday under Section 9.010, RSMo 1969, known as "Columbus Day", Section 9.020, RSMo Supp. 1971.

Section 114.080, RSMo 1969 provides in part:

"2. The county clerk's office is open for permanent registration at all times the office is open for other business, except the office is not open on Sundays and holidays. Registration shall be held at the office of the county clerk within the hours which said office is ordinarily open."

Section 116.030, RSMo 1969 provides in part as follows:

". . . The county clerk's office shall be open for permanent registration at all times that such office is open for other business, Sundays and holidays excepted. . . ."

In construing a similar provision this office held in Opinion No. 24, dated August 18, 1954 to the Board of Election Commissioners for the City of St. Louis, copy enclosed, that such statutory language merely states when the office must be open and that it is optional as to whether the office will be open on a legal holiday.

Honorable James C. Kirkpatrick

CONCLUSION

It is the opinion of this office that the Missouri statutes with respect to the close of voter registration which provide for different closing dates for such registration are valid. The General Assembly of Missouri can by statutory enactment provide for a uniform closing date for registration throughout the state. County clerks are not prohibited from opening their offices for registration on a legal holiday under Sections 114.080 or 116.030, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 24, 8/18/54
Board of Election Commissioners



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

October 16, 1972

OPINION LETTER NO. 274

Honorable Ralph Combs
State Representative, District 89
305 North Grand
King City, Missouri 64463

Dear Representative Combs:

This is in reply to your request for an official opinion of this office concerning the question of whether Section 272.110, RSMo, relating to fences, applies to the Conservation Department of Missouri.

Chapter 272, RSMo, relates to fences and enclosures and Section 272.110 has certain requirements for division fences to be kept in repair.

In Attorney General's Opinion No. 89 dated September 3, 1953 to the Honorable Gene Thompson (copy enclosed), we ruled that a school district does not come under this law under the fundamental rule of statutory construction that unless it is clearly indicated that the intent of the legislature is to include the state and its subdivisions in a statute they will not be considered within the purview of any particular statute. Since school districts were not mentioned anywhere in the statute we ruled that they were not covered by the statute.

In 1966 we ruled, in Opinion No. 202, March 17, 1966, to the Honorable Clyde F. Portell, that neither the state nor a county was to share the cost of building fences pursuant to the local option provisions of the fencing law in Sections 272.210 through 272.370, RSMo. The basis of this ruling was the same that since the statutes did not specifically refer to the state or counties they were not covered by the law.

Honorable Ralph Combs

Accordingly, since the State or the Conservation Commission is not specifically mentioned in Section 272.110, it is our opinion that such provisions do not apply to the Missouri Conservation Department.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 89
9/3/53, Thompson

Op. No. 202
3/17/66, Portell

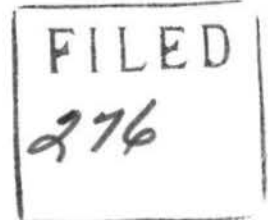
POLICE:
RESIDENCE:
ST. LOUIS CITY:

The City of St. Louis has no authority to require that officers of the police force of such city hired after a specified date reside within the city.

OPINION NO. 276

October 16, 1972

Honorable Fred Williams
State Representative
5621 Chamberlain
St. Louis, Missouri 63112



Dear Representative Williams:

This opinion is in response to your opinion request in which you inquire with respect to the recent controversy that has arisen in the City of St. Louis concerning the question whether the board of aldermen may by ordinance require that police officers of the city hired after a specified date be residents of such city.

We understand that the board of police commissioners has promulgated a rule that police officers be residents of the City of St. Louis or of St. Louis County.

The provisions respecting the police force of the City of St. Louis and the authority of the board of police commissioners are contained in Sections 84.010 to 84.340, RSMo. Under Section 84.010, RSMo, the city is prohibited from passing any ordinances which in any manner conflict or interfere with the powers or the exercise of powers of the board of police commissioners. Under subsection 2 of Section 84.170, RSMo, the board is "authorized to make all such rules and regulations, not inconsistent with sections 84.010 to 84.340, or other laws of the state, as [it] may judge necessary, for the appointment, employment, uniforming, discipline, trial and government of the police." Under Section 84.100 (House Bill No. 1144, 76th General Assembly, Second Regular Session), the board is also given express authority and is required "to appoint, enroll and employ a permanent police force."

Further, it is noteworthy that Section 84.220, RSMo makes it a crime for "[a]ny officer or servant of the mayor or common council or municipal assembly" to "hinder or obstruct the organization or maintenance of said board of police, or the police force" thereby indicating a clear legislative intent to keep the

Honorable Fred Williams

board and the force independent from municipal control. Later legislation, such as Section 84.150 (House Bill No. 1144, 76th General Assembly, Second Regular Session) expressly provides for approval of the municipal board of estimate and apportionment with respect to the numbers of such officers and although such section is not directly applicable in these premises it is at least one instance where the legislature has indicated that express statutory approval would have to be given the city to authorize interference with the operation of the police force.

In addition we note that the Missouri Supreme Court has consistently held that municipal corporations are subordinate to the sovereign power of the state and that the police force of the City of St. Louis being a metropolitan police force created by statute is not solely a matter of local concern. State ex rel. Sanders v. Cervantes, 480 S.W.2d 888 (1972).

There should be no doubt that these statutes still apply to the City of St. Louis despite a change in population. Section 1.100, RSMo Supp. 1971.

We also note that we find no constitutional or statutory provision requiring that such police officers be residents of the city.

CONCLUSION

It is the opinion of this office that the City of St. Louis has no authority to require that officers of the police force of such city hired after a specified date reside within the city.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

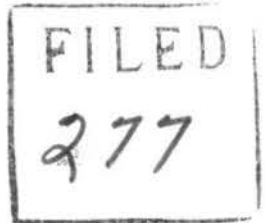
JOHN C. DANFORTH
Attorney General

RESIDENCE: (1) The St. Louis Board of Election
ELECTIONS: Commissioners should not send absentee
ABSENTEE VOTING: ballots listing the names of candidates
for state and local offices (including Congressional candidates) to legal residents of St. Louis temporarily living outside Missouri who are not registered voters.
(2) The St. Louis Board of Election Commissioners must send absentee ballots listing the names of Presidential and Vice Presidential candidates to legal residents of St. Louis temporarily living outside Missouri who are not registered voters.

OPINION NO. 277

October 16, 1972

Mr. John T. Wiley, Chairman
Board of Election Commissioners
City of St. Louis
208 South 12th Boulevard
St. Louis, Missouri 63102



Dear Mr. Wiley:

This official opinion is in response to your request for a ruling on whether two formerly-registered voters in the City of St. Louis now living in London, England, should be sent absentee ballots from the City of St. Louis.

The facts as they appear in your request are as follows: A man and his wife lived in St. Louis City and were registered voters therein for ten years prior to 1964, but left in that year and for undisclosed reasons lost their registration. They currently live in London, England, and have retained their American citizenship. They state, in separate affidavits, that they intend to retain their domicile in Missouri and to return here in the future and have each requested absentee ballots for the November 1972 election.

In general, the laws of the state govern the operation of elections, defining who is eligible to vote, who must register and when, and who may receive absentee ballots. McDonald v. Board of Election Commissioners, 394 U.S. 802, 22 L.Ed.2d 739, 89 S.Ct. 1404 (1969). However, these laws may not conflict with federal constitutional provisions or with valid Acts of Congress; if there is a conflict, federal law prevails. United States Constitution, Article VI, section 2 (Supremacy Clause).

Mr. John T. Wiley

In the Voting Rights Act of 1970, Congress enacted laws controlling absentee voting in presidential elections, but not in state elections. In this opinion, we will examine first the law of Missouri governing state and local elections, and then we will see the modifications upon that law created by the federal statute.

I.

Missouri State and Local Elections

The issuance of absentee ballots for Missouri elections is governed by Chapter 112 of the Revised Statutes. Section 112.010 (House Bill No. 1167, 76th General Assembly, Second Regular Session), provides that:

"Any duly qualified voter of the state of Missouri, other than a person in military or naval service, who expects to be absent from the county in which he is a qualified voter on the day of any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, or any person who through illness or physical disability expects to be prevented from personally going to the polls to vote on election day or any person whose religious beliefs prevent him from personally going to the polls to vote on election day, may vote at such election as provided in sections 112.010 to 112.110."

Further, Section 112.030(2), RSMo, provides that:

"The election authority shall not furnish a ballot to any person who is not lawfully entitled to vote. . . ."

Thus, an absentee ballot for a Missouri election can only be sent to one who is eligible to vote. Voter eligibility in St. Louis City is defined by Sections 118.020, RSMo and 118.030 (House Bill No. 1216, 76th General Assembly, Second Regular Session) and those sections require registration as a qualification of voting. The applicants here are unregistered. We assume that the applicants are qualified to vote in all other respects, but without

Mr. John T. Wiley

registration they are not qualified voters in St. Louis eligible to vote for state or local candidates. From this it follows that they are not eligible to receive an absentee ballot listing the names of state and local candidates, and their application should be denied to that extent.

II.

Presidential Elections

In 1970, the United States Congress amended the Voting Rights Act by adding a section dealing with the conduct of presidential election, P.L. 91-285, Section 6, 84 Stat. 316, which appears at 42 U.S.C., Section 1973aa-1. Among its other provisions, this section requires the issuance of absentee ballots for presidential elections. The paragraphs relevant to this opinion are (c), (d) and (f), which provide as follows:

"(c) No citizens of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

"(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President

Mr. John T. Wiley

and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

* * *

"(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of registration that does not include a provision for absentee registration."

42 U.S.C., Section 1973aa-1 was challenged in the United States Supreme Court, and the Court specifically held that the law requiring absentee ballots in presidential elections was within the power of Congress to enact. Oregon v. Mitchell, 400 U.S. 112, 27 L.Ed.2d 272, 91 S.Ct. 260 (1970).

The Act requires that Missouri "shall provide by law" for absentee ballots available to "all duly qualified residents" of Missouri, and that Missouri may not deny absentee ballots to unregistered residents where Missouri law "does not include a provision for absentee registration." The Act is made enforceable by the Attorney General of the United States, 42 U.S.C., Section 1973aa-2, and failure to obey the law is made a criminal offense, 42 U.S.C., Section 1973aa-3.

Despite this mandatory language, Missouri statutes have not been amended to conform to the provisions of the Voting Rights Act. The Presidential "short ballot" can only be voted in person (except in those cases in which the voter has moved his residence from the state within thirty days of the election). Sections 111.031, RSMo Supp. 1971, to 111.061, RSMo; 112.040(2) (House Bill No. 1167, 76th General Assembly, Second Regular Session). No provision for absentee registration of voters in St. Louis has been added to the laws. It is the opinion of this

Mr. John T. Wiley

office that the failure of the Legislature to act does not relieve election officials in Missouri of the obligation of granting absentee ballots to persons eligible for them under the federal law.

A state statute which restricts a right granted or guaranteed by an Act of Congress is in conflict with that Act and therefore is invalid under the Supremacy Clause of the United States Constitution, Article VI, Section 2. Motor Coach Employees v. Missouri, 374 U.S. 74, 10 L.Ed.2d 763, 83 S.Ct. 1657 (1963). Where a federal law defines the right of certain persons to vote, state laws setting different standards may not be enforced. Katzenbach v. Morgan, 384 U.S. 641, 16 L.Ed.2d 828, 86 S.Ct. 1717 (1966). These cases control the present question. Eligibility for absentee ballots for the presidential election is a matter of federal law, and Missouri has no choice but to follow the federal mandate.

The federal statute leaves the mechanism of issuing absentee ballots to the states. Although no specific forms are set out in the Missouri statutes, this does not prevent absentee voting, for there are many affidavits found in the election laws, and an appropriate form should be drafted by the Board of Election Commissioners.

One further question remains, and that is whether the applicants meet the test of residency under the statute. The question of the residency of a person absent from Missouri was recently explored fully in the case of State ex rel. King v. Walsh, No. 58037 (Mo. banc 8-5-72), which ruled that Christopher (Kit) Bond was eligible to run for Governor of Missouri. The Court there said that "residence is largely a matter of intention," and that one's domicile "when once established, continues until he renounces it and takes up another in its stead," (Slip Opinion at 7), even though he is absent from his domicile for a period of years. Intent, of course, is shown by deeds as well as words, and it is proper to consider all relevant facts before reaching a conclusion.

The applicants herein have been absent from St. Louis for eight years. Nevertheless, they state that they intend to maintain a Missouri domicile and to return here, and no facts are shown which contravene that intent. The Board of Election Commissioners may have cause to challenge that intent. However, it is the opinion of this office that, if these statements are true and no contrary intent is proven, the applicants meet the standards of residency under Missouri law and they are eligible to receive absentee ballots under 42 U.S.C., Section 1973aa-1.

CONCLUSION

Therefore, it is the opinion of this office that:

Mr. John T. Wiley

(1) The St. Louis Board of Election Commissioners should not send absentee ballots listing the names of candidates for state and local offices (including Congressional candidates) to legal residents of St. Louis temporarily living outside Missouri who are not registered voters.

(2) The St. Louis Board of Election Commissioners must send absentee ballots listing the names of Presidential and Vice Presidential candidates to legal residents of St. Louis temporarily living outside Missouri who are not registered voters.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

FEES:
COURT COSTS:
CIRCUIT CLERKS:

With respect to the distribution of fees collected by the circuit clerk in civil and criminal cases under the provisions of Sections 483.530, 483.540 and 483.541 (House Committee Substitute for Senate Bill No. 496, 76th General Assembly, Second Regular Session) that:
(1) Fifty percent of the fees earned and collected under Sections 483.530 and 483.540 go to the county and fifty percent to the director of revenue in the manner provided in Section 483.541;
(2) Section 483.530 excepts from charge and collection the fees enumerated in such section in cases where the defendant is certified by the judge to be indigent and unable to pay; (3) Section 483.540 respecting fees in civil cases applies to juvenile court proceedings. Such fees are taxed under Section 211.281, RSMo, and whether collected from the county or from individuals fifty percent is to be paid pursuant to Section 483.541 to the director of revenue; (4) Section 483.540 respecting fees in civil cases applies to Uniform Support cases. Such fees may be taxed under Section 454.150, RSMo, and if collected from the county or from individuals fifty percent is to be paid pursuant to Section 483.541 to the director of revenue.

OPINION NO. 280

November 20, 1972

Honorable W. Clifton Banta, Jr.
Prosecuting Attorney
Mississippi County
Post Office Box 469
Charleston, Missouri



Dear Mr. Banta:

This opinion is in response to questions posed by you and by the clerk of the circuit court of Mississippi County which we paraphrase for the sake of brevity.

The first question asks when the clerk should make the distribution required under Section 483.541 (House Committee Substitute for Senate Bill No. 496, 76th General Assembly, Second Regular Session).

Section 483.541 provides:

"1. It shall be the duty of the clerk of all circuit courts and courts of common pleas of this state with the approval of the judge of the court to charge, on behalf of the state,

Honorable W. Clifton Banta, Jr.

fifty percent of every fee that accrues in his office by reason of sections 483.530 and 483.540, and to receive the same, and at the end of each month pay over to the director of revenue all such money collected by him as such fees, taking two receipts therefor, one of which he shall immediately file with the state treasurer, and shall at the end of each month make out an itemized and accurate list verified by affidavit of all fees collected by him, giving the name of the person or persons paying the same, and turn over the report to the director of revenue.

"2. On or before the thirty-first day of January of each year the circuit clerk shall file a verified report with the county treasurer or treasurer of the city of St. Louis, as the case may be, and with the director of revenue, showing all fees due and unpaid in his office in cases where the liability thereof has finally been established during the preceding year, showing the name of the person or persons owing same, and stating that he has been unable, after the exercise of diligence, to collect the same. The prosecuting attorney of the county or of the city of St. Louis shall collect such unpaid fees and shall deposit them with the circuit clerk, who will receipt him therefor, and the clerk shall forward the funds to the proper authority as is provided by law.

"3. All circuit court fees received by the director of revenue shall be deposited by him with the state treasurer in the 'Court Judicial Fund' which is hereby created; provided, that the treasurer shall deposit all moneys in excess of two hundred fifty thousand dollars in general revenue. The money in the court judicial fund shall be used for no other purpose than for the payment of salaries of the supreme court, districts of the court of appeals, and circuit judges and commissioners; provided, however, that such salaries shall be paid from the general revenue fund of the state whenever the balance in the court judicial fund or the appropriation from such fund is insufficient to pay the salaries."

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We previously held in Opinion No. 420, dated November 24, 1971, to Paden, copy enclosed, that the circuit clerk has authority to pay the costs of an action out of a cost deposit made by the plaintiff after the rendition of a default judgment in which the costs are taxed to a defendant against whom execution could not be levied. It is our interpretation of Section 483.541 that once the fees or any part thereof provided in Sections 483.530 and 483.540 (H.C.S.S.B. No. 496, 76th General Assembly, Second Regular Session) have accrued and been collected by the clerk, the distribution should be made monthly as therein provided. This means then that fifty percent of all such fees earned and collected by the clerk must be paid monthly to the director of revenue. The other fifty percent of such fees earned and collected must be paid to the county as provided in Sections 483.530 and 483.540.

Your second question asks how you should handle the fees in criminal cases provided for in Section 483.530 when the defendant is indigent. Section 483.530 provides:

"1. The clerks of the circuit courts, courts of criminal correction, and courts of common pleas of this state possessing criminal jurisdiction shall charge and collect, except in those cases where the defendant is certified by the judge of the court to be an indigent person and unable to pay the fees, the following fees:

For each criminal case \$15.00
For each appeal from municipal court for a
municipal ordinance violation. 15.00

Fifty percent of the fees collected by the clerk shall be paid into the county treasury, or in the case of the city of St. Louis into the city treasury, in the manner provided by law, and fifty percent shall be paid to the state director of revenue in the manner provided in section 483.541." (Emphasis added)

The provision that we have underscored above means that the clerk does not charge or collect such fees where the defendant is certified by the judge of the court to be an indigent person and unable to pay such fees.

Your third question asks how fees collected by the circuit clerk in juvenile cases should be handled. Juvenile cases are civil cases and Section 483.540 is applicable to such cases. Section 483.540 provides:

Honorable W. Clifton Banta, Jr.

"1. The clerks of the circuit courts and of the courts of common pleas, shall charge and collect in all civil proceedings the following fees to aid in defraying the expenses of judicial administration:

Each civil case instituted in that court. . .	\$25.00
Each additional summons issued for additional defendants	1.00
Each alias summons issued	1.00
Each pluralis summons issued.	1.00
Each third party defendant issued	1.00
Each appeal from municipal courts	20.00
Each appeal from magistrate courts.	20.00

In circuits where there is more than one section or division of the court, costs in any case shall be charged in only the division or divisions in which the case may be carried.

"2. Fifty percent of all fees collected shall be paid into the county treasury in the manner provided in section 483.560 or in the case of the city of St. Louis, paid into the city treasury in the manner provided in section 483.545, and the remaining fifty percent of the fees shall be paid to the director of revenue in the manner provided in section 483.541."

The liability for costs in juvenile cases is determined under the provisions of Section 211.281, RSMo, which provides:

"The costs of the proceedings in any case in the juvenile court may, in the discretion of the court be adjudged against the parents of the child involved or the informing witness as provided in section 211.081, as the case may be, and collected as provided by law. All costs not so collected shall be paid by the county."

Thus, if the fees are not collected from other persons adjudged to be liable they must be collected from the county. Under Section 483.541, half of the amount collected under Section 483.540 must be paid monthly to the director of revenue.

Your fourth question asks how fees collected by the circuit clerk are to be handled in Uniform Support cases. Section 454.150, RSMo, with respect to costs and fees in such cases, provides:

Honorable W. Clifton Banta, Jr.

"There shall be no filing fee or other costs taxable to the obligee [any person to whom a duty of support is owed and a state or political subdivision thereof, Section 545.020(7), RSMo] but a court of this state acting either as an initiating or responding state may in its discretion direct that any part of or all fees and costs incurred in this state, including without limitation by enumeration, fees for filing, service of process, seizure of property, and stenographic service of both plaintiff and defendant or either, be paid by the obligor [any person owning a duty of support, Section 454.020(8), RSMo] or the county."

Thus, if the fees established under Section 483.540 are charged against individuals, fifty percent is to go to the county under Section 483.540 and fifty percent to the director of revenue in the manner provided in Section 483.541, and if such fees are taxed against the county, then fifty percent of such fees are to go to the director of revenue as provided in Section 483.541.

Obviously, in either of the instances above, if such fees are the liability of the county, it is only necessary for the clerk to collect and disburse the fifty percent required to be paid to the director of revenue.

We also understand that the various circuit courts have different requirements respecting the deposit for costs in civil cases. However, we do not pass upon the right of such courts to require a deposit from everyone filing a lawsuit.

CONCLUSION

It is the opinion of this office with respect to the distribution of fees collected by the circuit clerk in civil and criminal cases under the provisions of Sections 483.530, 483.540 and 483.541 (House Committee Substitute for Senate Bill No. 496, 76th General Assembly, Second Regular Session) that:

(1) Fifty percent of the fees earned and collected under Sections 483.530 and 483.540 go to the county and fifty percent to the director of revenue in the manner provided in Section 483.541;

(2) Section 483.530 excepts from charge and collection the fees enumerated in such section in cases where the defendant is certified by the judge to be indigent and unable to pay;

Honorable W. Clifton Banta, Jr.

(3) Section 483.540 respecting fees in civil cases applies to juvenile court proceedings. Such fees are taxed under Section 211.281, RSMo, and whether collected from the county or from individuals fifty percent is to be paid pursuant to Section 483.541 to the director of revenue.

(4) Section 483.540 respecting fees in civil cases applies to Uniform Support cases. Such fees may be taxed under Section 454.150, RSMo, and if collected from the county or from individuals fifty percent is to be paid pursuant to Section 483.541 to the director of revenue.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

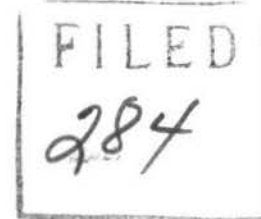
Enclosure: Op. Ltr. No. 420
11/24/71, Paden

NOMINATIONS: With respect to the filing of nomi-
ELECTIONS: nations by party committees under
CANDIDATES: the provisions of Section 120.550,
SECRETARY OF STATE: RSMo to fill vacancies in the nomi-
nations for state representative and
state senator: (1) The filing must be with the Secretary of
State; (2) Telegraphic filing is not authorized under Section
120.550, RSMo.

OPINION NO. 284

October 25, 1972

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This opinion is in answer to your questions asking:

- "1. Does Section 120.550 provide alternative methods for filing the nomination to fill a vacancy for state office (either with the St. Louis Board of Election Commissioners or the Secretary of State), or must the filing be made in this office? If the filing is made prior to the deadline with the St. Louis Board of Election Commissioners, should the nominees name be placed on the ballot?
- "2. May a nomination to fill a vacancy under Section 120.550 be made by telegram, or must the nomination be a signed, original document?
- "3. If a telegram is an acceptable form of filing a nomination with the Secretary of State, must that telegram be received by the Secretary of State within the filing deadline or is receipt by the local Western Union office sufficient?
- "4. Is the filing fee in Section 120.550-3 required to be paid prior to the deadline for filing and, if not required,

Honorable James C. Kirkpatrick

is the Secretary of State authorized to certify the nominee to the appropriate election authority without that fee having been paid?"

You also state that:

"Arthur Pfautch filed his Declaration of Candidacy as a Republican candidate for State Representative of the 87th Legislative District in this office at 3:17 p.m. April 25, 1972. Richard F. Greenwald filed his Declaration of Candidacy as State Senator on the Republican ticket for the 3rd Senatorial District in this office at 3:18 p.m. April 25, 1972. Both of these individuals were nominated in the primary election.

"On September 21, 1972, both of the above named nominees withdrew, stating they would 'not accept the office if elected.' Their notifications of withdrawal were filed in this office.

* * *

"On Friday, October 6th, Fred Whaley, chairman of the Republican City Central Committee, sent this office two telegrams which stated that Orville Berg and Daniel Kearns had been chosen as nominees for the 87th Legislative District and the 3rd Senatorial District respectively. Those telegrams were apparently stamped in the Jefferson City Western Union office at 8:51 a.m., Saturday, October 7th. They were delivered to this office between 8:30 and 9:00 a.m. on the morning of Tuesday, October 10th. We are informed by Western Union that no attempt was made to deliver the messages prior to that time.

"In addition to the telegram sent this office, Mr. Whaley also delivered written notification of the replacement nominees to the offices of the St. Louis Board of Election Commissioners on Friday, October 6th. He claims that such filing is effective under Section 120.550 and that the candidates' names should appear on the ballot for the general election."

Honorable James C. Kirkpatrick

Section 120.550, RSMo, to which you refer, provides:

"1. The party committee of the county, district or state, as the case may be, shall have authority to make nominations in the following cases:

(1) When a vacancy in the candidates for nomination as a party candidate for election to any office shall occur by reason of death or resignation after the last day in which a person may file as a candidate for nomination;

(2) When any person nominated as the party candidate for any office shall die or resign before election;

(3) When a vacancy in office which is to be filled for the unexpired term at the following general election shall occur after the last day in which a person may file as a candidate for nomination.

"2. Nominations to fill vacancies caused by death shall be filed, as the case may be, either with the secretary of state not later than fifteen days before the day fixed by law for the election of the person in nomination or with the election authority not later than ten days before such election. Nominations to fill vacancies caused by resignation or withdrawal of a candidate shall be filed with the secretary of state or election authority not later than thirty days before the day fixed for election.

"3. No name shall be allowed on the ballot until the required fee has been paid."

Candidates for the office of state senator or state representative have to file in the office of the Secretary of State. Sections 120.345 and 120.370, RSMo. Under Section 120.550, subsection 2 above, such nominations "shall be filed, as the case may be, either with the secretary of state . . . or with the election authority" in the case of vacancies caused by death. And in instances as here where the vacancy is by resignation the nominations "shall be filed with the secretary of state or election authority." Our view is therefore that the legislature

Honorable James C. Kirkpatrick

intended that the filing be with the secretary of state in this instance and not in the alternative because the provisions read together indicate that the filing would be with the appropriate office only. (Compare Section 120.090, RSMo).

In answer to your second question with respect to whether a telegram is sufficient in the premises it is our view that it is not. Section 120.560, RSMo, although not applicable here, permits a vacancy to be filled when such vacancy "occurs too late to permit the committee to file its nomination within the time prescribed" by Section 120.550, and expressly authorizes the use of the telegraph in cases in which the exigency of time is so great as to require it. However, by comparison, even in that instance the telegraphic message is "to be followed by the filing of the papers." Telegraphic messages may import notice but the statute here requires filing of the nomination and this means the certificate of the party committee's nomination. In passing on the use of the telegraph, the Kansas City Court of Appeals said in Holman v. City of Macon, 177 S.W. 1078, 1080 (1915):

"Defendant, on the last day allowed for such motions, [for rehearing] telegraphed it to our clerk, and two days thereafter put it in writing and filed it. While telegrams are frequently used as evidence in appropriate instances, we are not advised of any law authorizing a court record or a pleading by telegraph. It is a step too radical to be taken without the sanction of the Legislature."


In view of our answer to your second question it is unnecessary to answer your third and fourth questions.

CONCLUSION

It is the opinion of this office with respect to the filing of nominations by party committees under the provisions of Section 120.550, RSMo to fill vacancies in the nominations for state representative and state senator that:

- (1) The filing must be with the Secretary of State;
- (2) Telegraphic filing is not authorized under Section 120.550, RSMo.

Very truly yours,


JOHN C. DANFORTH
Attorney General



OFFICES OF THE

JOHN C. DANFORTH
ATTORNEY GENERAL

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

November 9, 1972

OPINION LETTER NO. 287

Mr. Jack K. Smith, Executive Secretary
Missouri Clean Water Commission
Room 102 - State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Smith:

This letter is in response to your opinion request inquiring about the need to amend Senate Committee Substitute for Senate Bill No. 424, 76th General Assembly, Second Regular Session, known as the Missouri Clean Water Law. Specifically, you ask whether the Missouri Clean Water Commission may under this Missouri Clean Water Law require political subdivisions of this state to provide any of the twenty-five percent share of the reasonable cost of water pollution control projects not paid for by federal grants under the Federal Water Pollution Control Act Amendments of 1972. You state this would be done by the Missouri Clean Water Commission's designating the state's share to be less than twenty-five percent of such cost. Previously, the maximum federal share provided was fifty-five percent, thus leaving the local political subdivision with a contribution of at least twenty percent after the state provided its share up to a maximum contribution of twenty-five percent.

Section 202 of the Federal Water Pollution Control Act Amendments of 1972, designated "federal share" provides that the amount of any federal grant under this new act shall be seventy-five percent of the cost of construction. It is silent as to how the other twenty-five percent shall be provided, and therefore the federal law contains no requirements that the state legislature enact legislation requiring that a certain percentage be provided each by the state and its political subdivisions. Both the U. S. Senate Bill and the House Amendment, in provisions replaced by the final conference substitute, would have provided that the states contribute at least a certain portion of the nonfederal twenty-five percent in order for the project to be eligible for the maximum federal

Mr. Jack K. Smith

share. However, the deletion of these provisions in the final conference substitute leaves the matter entirely up to the states and whatever agencies the state may designate to determine whether local political subdivisions shall supply any portion of the nonfederal twenty-five percent.

As you point out in your letter requesting the opinion, the Missouri statutes provide in Section 204.106 of the Missouri Clean Water Law that the "state's contribution toward the cost of such water pollution control projects shall not exceed twenty-five percent of the estimated reasonable cost thereof". This is to be read in conjunction with Section 204.111 of the Missouri Clean Water Law that the "[Clean Water] commission is the agency for the administration of such funds as are granted by the state for this program. The administration of the granted funds shall be done in direct conjunction with the administration of federal funds granted for water pollution control projects" This indicates that the Missouri Clean Water Commission is to administer state funds in conjunction with the federal law which makes no requirements as to the division of the twenty-five percent. It seems clear that this would leave the percentage division of the nonfederal twenty-five percent up to the Clean Water Commission. Section 204.101 of the Missouri Clean Water Law also speaks of making grants without setting forth any requirement that the state and local subdivision each provide certain percentages.

This grant of authority to the Clean Water Commission is also clearly set out in Section 204.026.10 of the Missouri Clean Water Law that the Commission shall "[A]dminister state and federal grants to municipalities and political subdivisions for the planning and construction of sewage treatment works;". The comprehensive nature of the authority granted the Clean Water commission in this area is further emphasized by Section 204.136 which provides that the Clean Water Commission is designated as the water pollution agency for the state of Missouri and,

". . . for all purposes of any federal water pollution control act . . . may:

"(1) Take all necessary or appropriate action to obtain for the state the benefits of any federal act;

"(2) Apply for and receive federal funds made available under any federal act;

"(3) Approve projects for which loans or grants under any federal act are made to any municipality or agency of the state;"

Mr. Jack K. Smith

When examining the words of the Missouri Clean Water Law to determine the breadth of the grant of authority to the Clean Water Commission concerning application of state grant funds, the legislature used the terms "administer" and "administration" to describe this authority. This term is susceptible of many meanings and because of this susceptibility to broad interpretation does not lend itself to a narrow or technical grant of power. Had the legislature been concerned that the Clean Water Commission's duties would be something less than just assuring that the state's portion not exceed twenty-five percent of the reasonable estimated cost, it certainly would have said so in the Missouri Clean Water Law. Nowhere does this appear, and it certainly would have been careful to use more precise terms than "administer" and "administration."

Various courts have noted the broad interpretation of the terms "administer" and "administration" in the following cases: Glocksens v. Holmes, 299 Ky. 626, 186 S.W.2d 634 (1945); Christgau v. Fine, 223 Minn. 452, 27 N.W.2d 193 (1947); and In re Fleischer, 151 F. 81 (S.D.N.Y. 1907). These cases all note that the terms at issue connote the authority to control, manage, conduct or regulate, all broad grants of authority.

The use of the terms "administer" and "administration" by the legislature indicates positive intention that broad authority with respect to federal grants, including the division of the nonfederal twenty-five percent of the cost between the state and local sources, be given to the Clean Water Commission. In the past, the Missouri Clean Water Commission has allocated sums of money to various municipalities and other local governmental units from a lump sum grant given the Clean Water Commission by the state legislature for this purpose. This past practice on the part of the legislature indicates that it would also intend that the Clean Water Commission determine what percentage of the nonfederal twenty-five percent of the reasonable cost of the project would be provided by the state, up to twenty-five percent.

One of the major functions of the Missouri Clean Water Commission under the Missouri Clean Water Law is the effective administration of the state and federal grant programs. This is one of the most effective means the Commission has of abating pollution as directed by the Missouri Clean Water Law. It seems clear that the legislature contemplated that the Commission would make maximum effective use of this tool by the proper allocation of funds, both in dollar amounts and percentage divisions, for water pollution control projects. To determine otherwise would drastically reduce the Commission's ability to prevent, control and abate existing or potential pollution as charged by the Missouri Clean Water Law.

Mr. Jack K. Smith

Another consideration supporting this interpretation of the Commission's authority to administer funds is the vast amount of detailed work required to carry out today's complicated legislative programs. The legislature must rely on state agencies to carry on its programs or it would soon become bogged down in a morass of details and thus drastically reduce the effectiveness of its own programs. It is not logical to assume that by the use of the words "administer" and "administration" the legislature intended for the Clean Water Commission to work out some of the details of the grant administration program, and yet leave others, nowhere designated, to the attention of the legislature itself.

Finally, the Missouri Supreme Court in Arkansas-Missouri Power Corporation v. City of Kennett, 349 Mo. 173, 159 S.W.2d 782, 784 (1942) quoted with approval from a case involving the issuance of bonds at an interest rate less than the maximum established by ordinance for the issuance of bonds:

"It is urged that the discretion vested in the mayor as to whether the bonds shall bear interest at 5 or 4 per cent. is a delegation of legislative power, and therefore the ordinance is void. The council had fixed the maximum rate of interest at 5 per cent., but said to the mayor: "If you can sell the bonds at a lower rate of interest it is your duty to do so."

* * *

"If the agent exceeds the authority given him by making the bonds bear a larger rate of interest than authorized by the ordinance, his act would be void; but, when he protects the interest of his principal by making a better bargain than authorized, his action is to sustained, because it benefits the party for whom he is acting." Frantz v. Jacob, 88 Ky. 525, 11 S.W. 654 (1889)

Therefore, so long as the Missouri Clean Water Commission does not allocate state funds which exceed the twenty-five percent of the estimated reasonable cost of the water pollution control project as limited by Section 204.106, RSMo, it is the opinion of this

Mr. Jack K. Smith

office that the Commission has the authority to determine what percent of the nonfederal funds is to be provided by both the state and by municipalities or other local governmental units.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

ELECTIONS:
BALLOTS:
ABSENTEE BALLOTS:

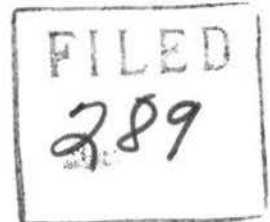
Persons who have resided in Missouri for thirty days or more but less than one year are eligible to vote in person or by absentee ballot for President and Vice President in this state without being registered.

No person who has resided in Missouri for more than one year, and who is not registered to vote, except a person who has been absent from his home for such period of time that it has been substantially impossible for him to register to vote in person, is eligible to receive any ballot for the November 7, 1972, election, in those areas of Missouri in which registration is required, except that in areas with local option registration (Chapter 114, RSMo 1969), no person who has lived in Missouri more than one year and is not registered may receive a ballot. A person not registered who has resided more than one year in an area of Missouri in which registration is required (other than an area having local option registration) can receive an absentee ballot for President and Vice President only when he has been absent from his home for such period of time that it has been substantially impossible for him to register to vote in person.

OPINION NO. 289

November 3, 1972

Honorable Robert A. Young
Missouri Senate, 24th District
3500 Adie Road
St. Ann, Missouri 63074



Dear Senator Young:

This official opinion is in response to your request for a ruling on the following question:

"Are students who are not registered but are otherwise qualified to vote entitled to receive a 'short ballot' enabling them to vote for President and Vice President only?"

The facts as they appear in your opinion are that certain students attending college have not registered at the place of registration where the college is located nor have they registered or received absentee ballots from their home town. The question is whether there is any means for them to receive the so-called short ballot.

While your request refers to students, this opinion is also applicable to other persons who are not students.

Honorable Robert A. Young

The first question arising from your request involves the place of residence of these students. In an opinion issued by this office in 1971, we concluded that a student eighteen years of age or older has the option of voting either from his original residence or from a residence established in the community where he attends school. The place of residence is determined by the student's declaration of intent and an examination of whether the facts regarding his residence are consistent with that declaration. See Opinion No. 387, to Honorable Charles S. Broomfield, September 3, 1971. Any conclusions herein dealing with eligibility to vote should therefore be read to apply to both possible residences.

The main problem in this opinion involves the availability of the short ballot to unregistered but otherwise qualified voters. The issuance of presidential ballots is governed by Sections 111.031 through 111.061, RSMo 1969 and Supp. 1971, and 42 U.S.C. §1973-aa-1. Each of these will be considered in turn.

I.

The Missouri statute governing the eligibility of Missouri residents for presidential ballots, Section 111.031(1), RSMo Supp. 1971, reads as follows:

"Any citizen of the United States who is otherwise qualified to vote under the constitution of this state and who has resided in this state thirty days or more but less than one year prior to the date of a presidential election may vote for presidential and vice-presidential electors at such election but for no other officers."

Section 111.041, RSMo 1969, provides that persons falling within its terms are not required to register. Thus, those persons who have changed their domicile to this state from another state in the past year but more than thirty days before the election can vote in person for President and Vice President by following the procedures set forth in Sections 111.031 through 111.061, RSMo 1969 and Supp. 1971, even though they are not registered.

These statutes, however, do not allow students who have resided in Missouri for more than one year to vote for President and Vice President. These students do not come within the statutes' literal terms, and the statutory scheme under Missouri law requires voting registration of all persons in certain cities and counties who have lived in Missouri for more than one year. Thus,

Honorable Robert A. Young

persons who are not registered but have lived in Missouri for more than one year may not vote at all under Missouri statutes, if they live in registration areas.

The opinion of the three-judge federal court in the case of Danforth v. Christian, Civil Action No. 1825 (W.D.Mo., 10/31/72), invalidating Missouri's one-year and sixty-day residency requirements, does not affect the availability of the short ballot to unregistered voters not coming within the terms of Section 111.031, RSMo Supp. 1971. That litigation involved solely the legality of durational requirements and did not challenge required registration. The holding in that case grants the right to vote for all purposes to all persons who have resided in Missouri more than thirty days in areas where registration is not required and grants to all persons who have resided in Missouri more than thirty days in areas in which registration is required the right to register and vote.

In summary, therefore, a short ballot will be made available under Missouri law to all persons who have changed their domicile to Missouri from another state within one year of the general elections and who have resided in this state thirty days or more. The short ballot will not be available under Missouri law to persons who will have resided in Missouri for more than one year by the date of the election.

II.

The United States Congress enacted as part of the Voting Rights Act of 1970, a section dealing with residency requirements and absentee voting in presidential elections, P.L. 91-285, §6, 84 Stat. 316, which appears in 42 U.S.C. §1973aa-1. The purpose of this statute is twofold:

"(1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections." Section 1973aa-1(b).

To carry out that purpose, Congress enacted sections creating rights for citizens and obligations upon the states regarding the conduct of presidential elections. Subsections (c), (d) and (f) are relevant to the question before us, and read as follows:

"(c) No citizens of the United States who is otherwise qualified to vote in any election

Honorable Robert A. Young

for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

"(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

* * *

"(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President

Honorable Robert A. Young

shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of registration that does not include a provision for absentee registration."

The questions remaining in this opinion are whether this language requires Missouri to make short ballots available to (1) unregistered persons who have resided in Missouri less than one year but more than thirty days and who will be absent from their residences on election day, and (2) unregistered persons who have lived in Missouri more than one year, where the persons reside in areas that require registration.

In approaching any question of statutory construction such as the one presented here, several principles must be kept in mind. First, the cardinal rule is to interpret a statute in a way that agrees with the intent of the legislature, as shown both by the language of the statute and by other expressions of intent, such as legislative history. The literal language of the statute, of course, is the best evidence of the legislature's intent, but where that language is susceptible of more than one interpretation, other aids can be resorted to. Second, a statute should be interpreted as a whole, in such a way that the various sections support a single consistent principle, insofar as that is possible. Third, a statute should be interpreted in a way that does not reach an obviously absurd or unworkable result. Finally, a statute should be interpreted wherever possible so that it is constitutional and within the power of the legislature to enact.

1. The intent of Congress in passing this law was to protect the vote of citizens who travel interstate. Had Congress desired to make the short ballot available to all citizens of the United States without further qualification, it would have done so in a direct fashion. Congress chose, however, to allow the states to require voter registration so long as that registration does not discriminate against citizens who had lived in the state more than thirty days. (Subsection (e) of the statute gives citizens who move within thirty days of an election the right to cast an absentee ballot from the state from which they moved. See Section 111.031(2), RSMo Supp. 1971).

It is clear from a reading of the federal statute that persons who have lived in Missouri for more than thirty days could be required by Missouri to register before they are allowed to vote the so-called short ballot. Section 111.041, RSMo 1969, waives the registration requirement for persons who have lived in the state less than one year, the residency period required

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by Missouri law until the opinion in Danforth v. Christian, supra. Persons who have lived in the state more than one year, however, are required under Missouri statutes to register (where registration is required) before they are eligible to cast any ballot. Insofar as they deal with in-person voting of the short ballot, it is the opinion of this office that the Missouri statutes are consistent with the intent and the language of the Voting Rights Act.

In a recent opinion dealing with this federal statute, this office ruled that the provisions requiring the states to provide for absentee voting of the short ballot are mandatory on Missouri election officials, even absent enabling legislation by the Missouri Legislature. Opinion No. 277, to John T. Wiley, October 16, 1972. That conclusion controls here as well. Any person who is eligible to vote a short ballot in person must be able to vote a short ballot absentee as well, if he will be absent from his residence or unable to vote in person on election day. The procedures to be employed should be substantially those provided for other voters in Chapter 112, RSMo, except that appropriate changes in the affidavits required may be made.

It could be argued that the failure of Missouri to provide statewide voter absentee registration further means that all citizens, regardless of registration and length of residence in the state, are eligible to vote an absentee short ballot, pursuant to subsection (f) of the federal statute. It is the opinion of this office, however, that such an interpretation of the federal statute is not in accordance with the intent of Congress, and is not the proper conclusion to be reached.

This office recently issued an opinion in which we concluded that subsection (f) required the St. Louis Board of Election Commissioners to send absentee short ballots to persons residing overseas who have not been able to register by mail, since the election statutes do not permit absentee registration in St. Louis. Opinion No. 277-1972, supra. The facts in that opinion show that the applicants had been absent from Missouri since 1964, and therefore, that the lack of an absentee registration provision effectively barred them from exercising their right to vote. We believe that only where a person is similarly aggrieved by the lack of an absentee registration provision can he claim the benefit of subsection (f) of the statute.

Section 1973aa-1 was added to the Voting Rights Act by a Senate amendment to the House Bill offered by Senator Goldwater of Arizona. Senator Goldwater, in introducing the amendment, had this to say about what he considered the coverage of subsection (f) to be:

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"Accordingly, it seems entirely appropriate to ask that the same rule shall be applied on behalf of civilian citizens who are temporarily living away from their regular homes, whether they are visiting relative or friends abroad, attending college outside their own State, working for a U. S. firm overseas, or serving as Federal employees away from their normal homes." 116 Cong. Rec. 6992 (March 11 1970).

It is relevant to note that each of these examples involves a situation in which it would be extremely burdensome to require the applicant to return to his home town or county to register to vote in person. Thus it seems the intent of the law's author that a substantial and lengthy absence from the place of registration is necessary before an applicant can take advantage of subsection (f) and obtain an absentee ballot without registering to vote.

In summary, the intent of Congress is to allow all persons who have lived in a state more than thirty days to vote for President and Vice President provided that they comply with that state's registration requirements. The only exception to this general rule made by Congress is that, where no absentee registration is provided, persons who are unable to register in person may cast absentee ballots without registering.

2. The second consideration in interpreting a statute, regarding it as a whole, closely parallels the first. In looking at this law as a single unit, we find that when Congress guaranteed the availability of absentee voting, it intended to affirm, not revoke, state registration provisions, subject only to the single narrow exception. An interpretation of subsection (f) which would void all registration requirements where there is no provision for absentee registration could not be reconciled with the language of subsections (c) and (d), specifically allowing registration within thirty days of the date of the election.

If, on the other hand, subsection (f) is read as to waive registration requirements only for those residents of Missouri for more than one year who are unable to register because there is no absentee registration provision, and for no other persons, then subsections (c), (d) and (f) evidence a consistent scheme of allowing each state to require registration, so long as the method used does not conflict with the right of interstate travel.

3. A third rule of statutory construction requires reaching that interpretation which is most sensible and rational, when

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more than one interpretation of the language is possible. This rule follows from the presumption that a legislature acts in a rational manner to eliminate a perceived evil.

If this statute is read to allow persons an absentee ballot, providing that they live in areas which do not provide absentee registration, we would reach the absurd result that certain citizens of Missouri would be allowed to vote by absentee ballot who would not be entitled to vote in person. Furthermore, we would reach the result that students who attend schools in areas governed by Chapter 114, RSMo 1969, would not be allowed to vote either in person or by absentee ballot, since those counties do have a provision for absentee registration. In short, eligibility for the short presidential ballot would become entirely arbitrary and irrational.

If subsection (f) is read, however, to allow absentee ballots only to those persons who have been residents of Missouri more than one year who either have registered or who have not registered due to the lack of an absentee registration provision, but to deny absentee ballots to those persons who were able to register in person but neglected to do so, then the statute does make sense and it is consistent with the intent of Congress and the operation of Missouri election laws. The intent of Congress and of the State of Missouri to require registration as a precondition of voting in all but extraordinary cases would not be frustrated and the possibility of voter fraud would be minimized.

4. Finally, a statute should be read in a manner that is constitutional, when that is possible. Section 1973aa-1 was challenged before the Supreme Court in the case of Oregon v. Mitchell, 400 U.S. 112, 27 L.Ed.2d 272, 91 S.Ct. 260 (1970). Eight justices held that the statute was constitutional, while only one dissented. However, six of the eight justices who found the law valid did so on the grounds that it was in the exercise of the congressional power to protect the right of interstate travel, while only two found that it was an exercise of the congressional power to regulate federal elections and the right to vote in them. (Black and Douglas, JJ.). It is doubtful whether Congress intended to protect the right of some citizens to travel by voiding registration requirements as they apply to citizens who do not travel interstate. Furthermore, serious due process objections could be made to any interpretation of the statute that would allow certain citizens who have not registered to cast absentee ballots while denying them the right to vote in person, and that further denies other citizens, similarly unregistered for the same reasons, to cast any ballot whatsoever. The interpretation of the statute which allows absentee voting only for those citizens who do in fact travel, and are thereby

Honorable Robert A. Young

actually aggrieved by the absence of an absentee registration provision is consistent with both the power of Congress to protect interstate travel and with the due process clause.

Some counties in Missouri have absentee registration provisions. Section 114.060, RSMo 1969. In these counties, of course, Section 1973aa-1 (f) is inoperative, and all applicants for absentee ballots who have lived in Missouri for more than one year must be registered.

CONCLUSION

It is the opinion of this office that persons who have resided in Missouri for thirty days or more but less than one year are eligible to vote in person or by absentee ballot for President and Vice President in this state without being registered. No person who has resided in Missouri for more than one year, and who is not registered to vote, except a person who has been absent from his home for such period of time that it has been substantially impossible for him to register to vote in person, is eligible to receive any ballot for the November 7, 1972, election, in those areas of Missouri in which registration is required, except that in areas with local option registration (Chapter 114, RSMo 1969), no person who has lived in Missouri more than one year and is not registered may receive a ballot. A person not registered who has resided more than one year in an area of Missouri in which registration is required (other than an area having local option registration) can receive an absentee ballot for President and Vice President only when he has been absent from his home for such period of time that it has been substantially impossible for him to register to vote in person.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Very truly yours,



JOHN C. DANFORTH
Attorney General

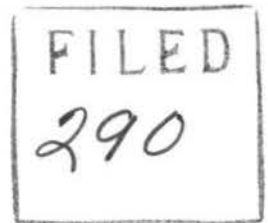
Enclosures: Op. No. 387
9/3/71, Broomfield

Op. No. 277
10/16/72, Wiley

OPINION LETTER NO. 290
Answer by Letter - Klaffenbach

December 4, 1972

Mr. Gary G. Sprick
Assistant Prosecuting Attorney
Boone County, Courthouse
Columbia, Missouri 65201



Dear Mr. Sprick:

This letter is in response to your request for an opinion in which you ask:

"Whether or not a county hospital organized under chapter 205 RSMo must advertise for new bids in order to build additional two floors on the hospital building or whether it can let this to contractor on the site by a change order under existing contract."

You also state that:

"A question has arisen in Boone County with respect to some construction work being undertaken by the Boone County Hospital. Said hospital is organized and governed under the provisions of Chapter 205 of the Revised Statutes of Missouri.

"In August, 1972, bids were taken and a contract was subsequently let to the John Epple Construction Company for the construction of the first three levels of the new nursing tower for Boone County Hospital. This tower is designed to eventually become seven levels high. The work now under contract provides for the middle floor to be completed internally and for the lower and upper floors to

Mr. Gary G. Sprick

be shelled in only. The base bid for the work now in progress was for two levels. An alternate bid for a third level to be shelled in only was taken and accepted. The base bid which was accepted was for \$1,558,900.00 and the alternate bid which was accepted was for \$222,000.00.

"Part of the intent in getting the third level as an alternate bid was to determine what the cost of the shelled in level would be so that, if funds were available, additional shelled in levels might be built. However, this was not spelled out in the specifications nor were any other bids requested or accepted for additional levels.

"The hospital now has money available to make it possible to add two more shelled in levels which would become levels four and five of the expansion plan. The present contractor, John Epple Construction Company, has indicated a desire and willingness to build the additional desired fourth and fifth shelled in floors on the same basis as he did on the alternate bid for the third floor which was accepted by the hospital. Attached hereto are certain statements and documents relating to this matter which give additional information concerning it and also point out the advantages to the hospital and to the public interest to shell in two additional floors as an extension of the work already under contract. However, the question presented is whether the two additional floors can be built by this present contractor by a change order which would simply make a change in the contract adding these two floors at a cost of approximately \$444,000.00 or whether these two floors must be rebid in the normal manner?"

Section 205.250, RSMo, which is applicable to such county hospitals, provides:

"No hospital buildings shall be erected or constructed until the plans and specifications have been made therefor and adopted by the board of hospital trustees, and bids advertised for according to law for other county public buildings."

Mr. Gary G. Sprick

Other procedures for contracts and bids for public buildings are found in Sections 50.660 and 49.420, RSMo. We find no statutory or case authority for a change order of the nature contemplated.

Section 205.250, which we quoted above, is strict in its requirement that there be advertisement for bids. In construing similar provisions in what is now Section 50.660, RSMo, the United States Court of Appeals for the Eighth Circuit in Layne-Western Co. v. Buchanan County, Mo., 85 F.2d 343, 347 (1936) stated:

" . . . The statute in the instant case, however, provides that 'all contracts and purchases' shall be let after competitive bidding. It would be hard to imagine a more inclusive statute. . . ."

Accordingly, we are of the view that the work cannot be completed by the contractor on a mere change order and that if the board of trustees wishes to add additional floors there must be advertisement for bids.

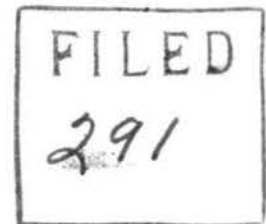
Very truly yours,

JOHN C. DANFORTH
Attorney General

December 21, 1972

OPINION LETTER NO. 291
Answer by letter-Wieler

Honorable Thomas D. Graham
State Representative
312 East Capitol Avenue
Jefferson City, Missouri 65101



Dear Representative Graham:

This is in response to your request for an opinion as to the legality of a not-for-profit corporation establishing and running a veterinary clinic or hospital to be used by the general public and charging fees for veterinary services. In your request, you indicate that the S.P.C.A. of Missouri, Inc., a general not-for-profit corporation in this state, has announced its intention to establish a clinic and shelter in St. Louis County, Missouri, with a veterinarian on duty twenty-four hours a day.

The S.P.C.A. of Missouri, Inc., has been incorporated in this state as a general not-for-profit corporation under the provisions of Chapter 355, RSMo. Its announced purpose as contained in the articles of incorporation is as follows:

"5. The Purposes of S.P.C.A. of Missouri, Inc. are to provide effective means for the prevention of cruelty to children and to animals in the State of Missouri and elsewhere; to promote the welfare of children and animals by any available legal means and methods; to aid in the alleviation of distress and suffering of children and animals; to conduct and participate in educational programs calculated to promote the foregoing Purposes; to aid in the enforcement of all laws which are or may be hereafter enacted for the prevention of cruelty to living creatures; to conduct and operate shelters, hospitals and clinics for

Honorable Thomas D. Graham

animals; and to engage in any and all activities in furtherance of the foregoing activities, including, but not by way of limitation, to encourage, advise and assist other persons and associations throughout the State of Missouri in creating organizations dedicated [sic] to the above enumerated Purposes of S.P.C.A. of Missouri, Inc."

The question raised in your opinion request deals with the provisions of Section 340.140, sub. 4, RSMo 1969, and its application to the announced intention of the S.P.C.A. of Missouri, Inc. This section provides that the employment of a veterinarian by a not-for-profit corporation for the purpose of providing or furnishing to the public of those services constituting the practice of veterinary medicine, whether such services are provided with or without charge, is not to be considered the illegal or unauthorized practice of veterinary medicine. However, a proviso indicates that this is not to be construed to mean that a charitable, or not-for-profit corporation shall hold itself out to the public as being engaged in the practice of veterinary medicine.

The statute by its very terms does not seek to prohibit a not-for-profit corporation from employing a duly licensed veterinarian to practice veterinary medicine. In our opinion, the furnishing of shelter and veterinarian care to animals by a not-for-profit corporation in conjunction with an overall purpose of promoting animal welfare and alleviating animal distress does not constitute the practice of veterinary medicine by that corporation. This is in keeping with the ruling in *State ex inf. Sager v. Lewin*, 106 S.W. 581 (St.L.Ct.App. 1907), in which it was held that the furnishing of medical treatment to persons by a corporation did not constitute the illegal practice of medicine when the medical and surgical services were performed by physicians under contract with the corporation.

Therefore, in the absence of any facts which would show that the S.P.C.A. of Missouri, Inc., was incorporated for the purpose of practicing veterinary medicine or intends to hold itself out to the public as being engaged in the practice of veterinary medicine, we are of the opinion that the establishment of a veterinary clinic and shelter by the S.P.C.A. of Missouri, Inc., with a veterinarian on duty twenty-four hours a day, would not constitute violation of Missouri law.

Yours very truly,

JOHN C. DANFORTH
Attorney General

PENSIONS:
RETIREMENT:
STATE EMPLOYEES:

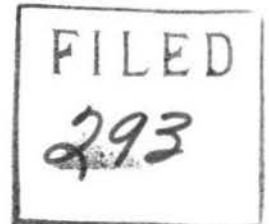
An individual who is presently re-
tired and receiving retirement bene-
fits which were calculated by mul-
tiplying one percent of his average

pay (not to exceed \$7,500 per year) during the five consecutive years
of work when his pay was the greatest, times his years of creditable
service, is not entitled to receive additional compensation under
House Bill No. 1178, Second Regular Session, 76th General Assembly
as a result of the change in the definition of average compensation
in October of 1967.

OPINION NO. 293

December 13, 1972

Mr. Edwin M. Bode, Secretary
Missouri State Employees'
Retirement System
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Bode:

This is to acknowledge receipt of your request for an opinion
from this office which reads as follows:

"Advice is requested as to whether or not an
individual who is presently retired and re-
ceiving retirement benefits which were calcu-
lated by multiplying one percent of his aver-
age pay (not to exceed \$7,500 per year) dur-
ing the five consecutive years of work when
his pay was the greatest, times his years of
creditable service, is entitled to have his
benefits recalculated under House Bill 1178,
as a result of the change in the definition
of average compensation from \$7,500 to \$15,000
in 1967."

Section 1 of House Bill No. 1178, which was passed by the 76th
General Assembly and signed by the Governor, reads as follows:

"1. Any person, other than a person receiv-
ing retirement benefits because of service in
the general assembly, who, on the effective
date of this act, is receiving state retire-
ment benefits from the Missouri state employ-
ees' retirement system or the highway employ-
ees' and highway patrol retirement system, upon

Mr. Edwin M. Bode

application to the board of trustees of the system from which he is receiving retirement benefits, shall be made, constituted, appointed and employed by the board as a special consultant on the problems of retirement, aging, and other state matters, for the remainder of his life, and upon request of the board, or other state agencies where such person was employed prior to retirement, give opinions, and be available to give opinions in writing, or orally, in response to such requests, as may be required, and for such services shall be compensated monthly, in an amount, which, when added to any monthly state retirement benefits being received, shall be equal to the state retirement benefits such person would have received if he had retired on January 1, 1972."
(Emphasis ours)

In connection with the above, you have also provided us with the following example:

"Law at retirement	under #1178 - ?
5-1-67 - 21 years 11 months service	
4 mos. 1967 - 2,500.00	4,634.90
1966 - 7,500.00	15,000.00
1965 - 7,500.00	14,044.28
1964 - 7,500.00	13,500.00
1963 - 7,500.00	11,544.22
8 mos. 1962 - 5,000.00	7,333.29
\$136.98 monthly	\$241.28 monthly"

House Bill No. 1178 provides that any person other than an individual receiving retirement benefits because of service in the General Assembly who is receiving retirement benefits from the Missouri State Employees' Retirement System, may be employed as a special consultant. A special consultant is to be compensated in an amount which, when added to any monthly state retirement benefits being received, would be equal to the state retirement benefits such person would have received if he had retired on January 1, 1972. The question then arises as to the interpretation of the date of January 1, 1972. In this regard, we will confine ourselves in this opinion request to an interpretation of House Bill No. 1178 as it relates to the Missouri State Employees' Retirement System and will not consider questions relating to the "Missouri Highway Employees and Highway Patrol Retirement System."

Mr. Edwin M. Bode

When the Missouri State Employees' Retirement System was established in 1957, Section 104.390, RSMo, provided in part that the normal annuity of a member should equal five-sixths of one percent ($5/6$ of 1%) of the average compensation of the member multiplied by the number of years of creditable service of each member. Subsection 6 of Section 104.310, RSMo, provided in part that "average compensation" was the average annual compensation, not to exceed seven thousand five hundred dollars (\$7,500) paid to a member for the five consecutive years of service prior to retirement when his compensation was greatest. See Laws of Missouri 1957, pages 707, 708 and 716. In 1961, Section 104.390, RSMo, was repealed and a new section enacted which provided that the normal annuity of a member should equal one percent (1%) of the average compensation of the member multiplied by the number of years of creditable service. See Laws of Missouri 1961, page 544. However, the definition of "average compensation" was not changed at this time and the maximum figure of seven thousand five hundred dollars (\$7,500) remained in effect. Thereafter, in 1967, subsection 6 of Section 104.310 was repealed and a new section enacted so that the definition of "average compensation" read as follows:

"(6) 'Average compensation' the average annual compensation paid to a member for the five consecutive years of service prior to retirement when his compensation was greatest: or if the member had less than five consecutive years of service, the average annual compensation paid to the member during the entire period of this service; provided, that any compensation paid which enters into total compensation shall not exceed Fifteen Thousand Dollars per annum if paid after the effective date of this act or Seven Thousand Five Hundred Dollars if paid prior to the effective date of this act."
(Emphasis ours) See Laws of Missouri 1967, page 188

The one percent (1%) formula as set forth in Section 104.390, RSMo 1969, was not changed at this time. Subsequently, Section 104.390, RSMo, and subsection 6 of Section 104.310, RSMo, were changed by the repeal and reenactment of these sections in Senate Bill No. 548, which was signed by the Governor and enacted into law on August 13, 1972. However, it is important to note that the one percent (1%) formula as set forth in Section 104.390, RSMo 1969, and the definition of "average compensation" as set forth in subsection 6 of Section 104.310, RSMo 1969, was the law in effect on January 1, 1972, before Senate Bill No. 548 was signed by the Governor and enacted into law on August 13, 1972.

Mr. Edwin M. Bode

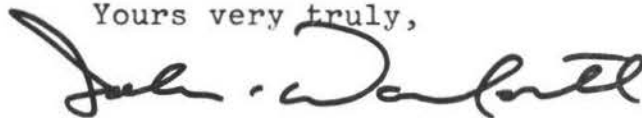
In connection with the above, subsection 6 of Section 104.310, RSMo 1969, in defining "average compensation," and which was the law in effect on January 1, 1972, provides that any compensation paid which enters into total compensation shall not exceed seven thousand five hundred dollars (\$7,500) if paid prior to October 13, 1967. In this regard, there is much authority to support the proposition that if the language used in a statute is plain and unambiguous, there is no reason for any construction. United Air Lines, Inc. v. State Tax Commission, 377 S.W.2d 444 (Mo. Banc 1964). Under such circumstances, it is our view that on January 1, 1972, the maximum compensation to be considered in determining an individual's "average compensation" would be seven thousand five hundred dollars (\$7,500) if paid prior to October 13, 1967.

CONCLUSION

It is our opinion that an individual who is presently retired and receiving retirement benefits which were calculated by multiplying one percent of his average pay (not to exceed \$7,500 per year) during the five consecutive years of work when his pay was the greatest, times his years of creditable service, is not entitled to receive additional compensation under House Bill No. 1178, Second Regular Session, 76th General Assembly as a result of the change in the definition of average compensation in October of 1967.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,



JOHN C. DANFORTH
Attorney General

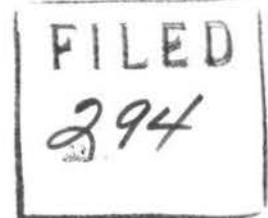
ELECTIONS:
ABSENTEE VOTING:

When votes are cast both for a deceased candidate and for his officially-designated successor in an election, the opposing candidate shall be declared elected if he receives more votes than were cast for both the deceased candidate and the successor candidate; the successor candidate shall be deemed elected if, not crediting him with votes for the deceased candidate, he receives more votes than were cast for the opposing candidate; and the election shall be declared void, if the opposing candidate receives more votes than the successor candidate but fewer votes than the total cast for the deceased candidate and the successor candidate. Straight party ticket votes for the party ticket which included the name of the deceased candidate shall be credited to the successor candidate as if the name of the successor had appeared thereon.

OPINION NO. 294

November 6, 1972

Honorable Donald E. Parker
Prosecuting Attorney
Buchanan County, Courthouse
St. Joseph, Missouri 64501



Dear Mr. Parker:

This official opinion is in response to your request for a ruling on a question arising from the following situation:

Eleven days prior to a general election, a candidate for county office died. The following day, the party committee of that candidate's party designated another person to fill the vacancy caused by the original candidate's death and to become the party's new candidate for that office, under procedures provided by Section 120.550, RSMo 1969. Prior to the death of the original candidate, however, absentee and war ballots had been issued and cast. You request a ruling on the following question:

How shall the clerk count those absentee ballots cast prior to the death of the original candidate?

Missouri election statutes give very little guidance in resolving the question presented by this opinion. Chapter 112, RSMo 1969, establishes the regulations governing absentee voting, and it requires, in Section 112.020, that each person who qualifies to vote an absentee ballot shall receive "an official ballot for the election district or precinct in which he resides." At the time the absentee ballots here involved were sent or given to the voters involved, the original candidate was the official

Honorable Donald E. Parker

nominee of his party and was properly placed on the ballot; therefore, the absentee voters did receive "an official ballot." Furthermore, absentee ballots are required to be prepared for distribution thirty days prior to an election (Section 112.020, RSMo 1969), and war ballots must be prepared within thirty days after the primary election, or approximately sixty days prior to a general election (Section 112.330(1), RSMo 1969). Section 120.550 provides a procedure for making substitute nominations in the case of a candidate's death, but provides no procedure for handling absentee ballots which have been previously issued.

Section 112.020 allows a voter to destroy his absentee ballot prior to 9:00 a.m. on the Friday before the election, if he will in fact be able to cast a vote in person on election day. However, the statutes make no provision at all for the counting of votes under a situation such as is found in the present case.

In approaching a question of election laws, it is important to keep in mind the opinion of the Supreme Court of Missouri in the case of Nance v. Kearbey, 251 Mo. 374, 158 S.W. 629 (1913). In that case the court stated, 158 S.W. 1.c. 631:

"two main settled and uniform rules of interpretation, thus:

"First. Election laws must be liberally construed in aid of the right of suffrage.
. . . The whole tendency of American authority is towards liberality to the end of sustaining the honest choice of electors.
. . . The choice of electors must be judicially respected, unless their voice is made to speak a lie, or a result radically vicious, because of a disregard of mandatory statutory safeguards.

"Second. The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction." (Citations omitted).

With this principle in mind, and with the guidance of decisions rendered by courts in this and other states, we turn now to resolving the question at hand.

Honorable Donald E. Parker

The question in this opinion is how those absentee votes cast while the now-dead candidate was on the ballot and not subsequently recast shall be tabulated. (For purposes of this opinion the death of a candidate shall also include any disqualification). In particular, there are three classes of votes which must be considered: first, those cast by voting a straight party ticket (i.e., placing an "X" in the Republican or Democratic column); second, those votes cast by marking an "X" to the name of the now deceased candidate; and third, those votes cast by marking an "X" next to the name of the candidate of the opposing party.

The first of these classes may be resolved simply. In the case of Bradley v. Cox, 197 S.W. 88 (Mo. Banc 1917), certain voters had been given party ballots which contained a name of a person who was not a candidate for the particular office his name was listed for. The court held that straight party ballots voted for the incorrect candidate should properly be counted as votes for the real candidate and, therefore, the official candidate was declared the winner. The court based its opinion on the premise that a voter who votes a straight party ticket intends thereby to cast a vote for all officially designated candidates of that party, and that an error in the printing of the ballots should not negate his opportunity to do so. More recently, this office followed that case in an opinion holding that "all straight party ballots of that particular party are to be counted as if the ballots contained the correct name of the candidate." Opinion No. 52, to Honorable Buddy Kay, March 2, 1971.

The logic of the Supreme Court decision requires the conclusion in this case that all votes cast for a straight party ticket should be counted as having been cast for those candidates who appear on the ballot on election day. Such a conclusion is most in keeping with the objective of attempting to giving effect to an elector's vote whenever possible.

The tabulation of votes cast for a particular person, as opposed to votes cast for a party, is more difficult. Here, the voter was expressing his preference as between two individuals, one of whom is no longer a candidate. Several possibilities for counting these ballots exist: They could be credited to the successor candidate, they could be credited to the deceased candidate (making it in effect a three way race), or they could be declared nullities. A consideration of relevant legal authority, however, indicates that a combination of these approaches is required. The general rule in American elections is that "votes cast for a deceased, disqualified or ineligible person, although ineffective to elect such person to office,

Honorable Donald E. Parker

are not to be treated as void or thrown away, but are to be counted in determining the results of the election as regards the other candidates." Anno. 133 A.L.R. 319. Most cases dealing with dead candidates have arisen under circumstances in which, although the candidate died prior to the election, his name remained on the ballot, and he received the highest number of votes. Where this was the case, the election was generally voided and a vacancy declared in the office, rather than deeming the votes for the dead man nullities and declaring the person with the next highest number of votes elected. See State ex Inf. McKittrick v. Cameron, 342 Mo. 830, 117 S.W.2d 1078 (1938) (ineligible candidate) and other cases cited in Anno., supra.

The reasoning behind this result is that the people who voted cast legal ballots, and in choosing candidate A, they, at the same time, rejected candidate B. The fortuity of A's death should not be allowed to frustrate the will of the people and cause B to be elected.

Although there is a split of authority on this point, the Missouri (and majority) rule is that even votes knowingly cast for a dead or ineligible candidate shall be counted, as they are a measure of the voter's intent that a vacancy in office is preferred to the election of the opposing candidate. State ex rel. Herget v. Walsh, 7 Mo.App. 142 (1879), cited with approval in Sheridan v. St. Louis, 183 Mo. 25, 81 S.W. 1082 (1904).

It does not necessarily follow, however, that votes cast for candidate A should be credited to his officially designated successor. People who voted for candidate A may have done so for any one of several reasons, and there is no legally required presumption that they would have voted for his successor candidate as well. See American Veterans Party v. Heffernan, 59 N.Y.S.2d 216, 186 Misc. 224 (N.Y.S.C.Sp.T. 1945).

Finally, votes cast for the candidate of the opposing party should still be credited to that candidate despite the death of his original adversary, since the opposing party candidate was the choice of those voters who voted for him to fill the office involved.

In conclusion, therefore, votes cast for the opposing candidate should be credited to him, while votes cast for the now-deceased candidate should be counted against the opposing candidate but not for the successor candidate. This may be done in the following fashion:

1. If the opposing candidate receives more votes than the total cast for the deceased candidate and the successor candidate, then the opposing candidate should be declared elected.

Honorable Donald E. Parker

2. If the successor candidate (not crediting him with any votes cast for the deceased candidate) should receive more votes than the opposing candidate, then the successor candidate should be declared elected.

3. If the opposing candidate should receive more votes than the successor candidate, but fewer votes than the total cast for the successor candidate and the deceased candidate, then the election should be declared void and a nullity.

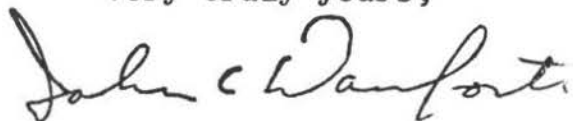
CONCLUSION

It is therefore the opinion of this office that:

When votes are cast both for a deceased candidate and for his officially-designated successor in an election, the opposing candidate shall be declared elected if he receives more votes than were cast for both the deceased candidate and the successor candidate; the successor candidate shall be deemed elected if, not crediting him with votes for the deceased candidate he receives more votes than were cast for the opposing candidate; and the election shall be declared void if the opposing candidate receives more votes than the successor candidate but fewer votes than the total cast for the deceased candidate and the successor candidate. Straight party ticket votes for the party ticket which included the name of the deceased candidate shall be credited to the successor candidate as if the name of the successor had appeared thereon.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Vodra.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 52
3/2/71, Kay

SHERIFFS:

DEPUTY SHERIFFS:

Except for special or emergency
deputy sheriffs appointed for a
period not exceeding thirty days

under provisions of Section 57.119, RSMo, deputy sheriffs can lawfully be appointed in a county of the second class only in the number fixed by the judges of the circuit court of such county and in the manner provided in Section 57.220, RSMo. A person holding an "honorary deputy sheriff's commission" that is one not issued under the provisions of Sections 57.119 or 57.220, RSMo, is not in contemplation of law a deputy sheriff and is not authorized to carry concealed weapons.

OPINION NO. 299

November 21, 1972

Honorable Dee Wampler
Prosecuting Attorney
Greene County, 206 Court House
Springfield, Missouri 65802



Dear Mr. Wampler:

This is in answer to your opinion request of recent date in which you ask as to the status of a person possessing an "honorary deputy sheriff's commission" in a second class county. It is our understanding that you refer to persons who have been issued purported commissions as deputy sheriffs by the sheriff and whose appointments have not been authorized or approved by the circuit court of such county and who are not appointed as emergency or special deputy sheriffs for a period of not to exceed thirty days as authorized by Section 57.119, RSMo. You further ask whether the persons possessing these "honorary deputy sheriff's commissions" are authorized under Section 564.610, RSMo, to carry concealed weapons.

Your opinion request is answered by several former opinions of this office, copies of which we enclose.

Opinion Letter No. 136 rendered April 30, 1969, to G. William Weier, holds that, with the exception of emergency or special deputies appointed for a period of not to exceed thirty days as provided for in Section 57.119, RSMo, deputy sheriffs cannot be appointed in a second class county except under provisions of Section 57.220, which provides that the judges of the circuit court shall determine the number of deputy sheriffs to be appointed in such county.

Honorable Dee Wampler

Opinion Letter No. 373 rendered September 11, 1969, to G. William Weier, holds that in second class counties under provisions of Section 57.220, RSMo, the number of deputy sheriffs other than emergency or special deputy sheriffs for a period of not to exceed thirty days can be appointed only in the number authorized by the circuit judges of such county. The opinion further holds that the circuit judges may by agreement with the sheriff provide for a nominal payment for such deputies and that there is no authorization to appoint deputies to serve without compensation.

Opinion No. 99 rendered May 24, 1956, to James E. Woodfill, holds that lawfully appointed deputy sheriffs are, under the provisions of Section 564.610, RSMo, lawfully authorized to carry concealed weapons. It is clear, of course, that in order for a deputy sheriff to come within the exemption provisions of Section 564.610 it is necessary that his appointment be one authorized by law. It follows, therefore, that a person holding an "honorary deputy sheriff's commission" in a second class county not issued as provided for in either Sections 57.119 or 57.220, RSMo, is not a "deputy sheriff" within the meaning of Section 564.610 and has no lawful right to carry concealed weapons.

CONCLUSION

It is the opinion of this office that except for special or emergency deputy sheriffs appointed for a period not exceeding thirty days under provisions of Section 57.119, RSMo, deputy sheriffs can lawfully be appointed in a county of the second class only in the number fixed by the judges of the circuit court of such county and in the manner provided in Section 57.220, RSMo. A person holding an "honorary deputy sheriff's commission" that is one not issued under the provisions of Sections 57.119 or 57.220, RSMo, is not in contemplation of law a deputy sheriff and is not authorized to carry concealed weapons.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. Ltr. No. 136, 4/30/69, Weier
Op. Ltr. No. 373, 9/11/69, Weier
Op. No. 99, 5/24/56, Woodfill

GOVERNOR:
EXECUTIVE ORDERS:
MERIT SYSTEM:

The Governor's Executive Order dated May 2, 1972, purporting to place certain employees of the Missouri Public Service Commission under the provisions of Chapter 36, the state merit system, is invalid.

OPINION NO. 302

December 19, 1972

Commissioner James F. Mauze
Missouri Public Service Commission
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Commissioner Mauze:

This opinion is in answer to your questions respecting the Governor's Executive Order dated May 2, 1972, which purports to place the employees of the Public Service Commission of Missouri, with some exceptions, under the merit system provisions of Chapter 36. Your first two questions deal with the implementation of such executive order, if valid, and the third question asks whether the order is valid. Because of the conclusion we have reached we will discuss only the question concerning the validity of the order.

Section 19 of Article IV of the Missouri Constitution provides:

"The head of each department may select and remove all appointees in the department except as otherwise provided in this constitution, or by law. All employees in the state eleemosynary and penal institutions, and other state employees as provided by law, shall be selected on the basis of merit, ascertained as nearly as practicable by competitive examinations; provided that any honorably discharged member of the armed services of the United States who is a citizen of this state shall have preference in examination and appointment as prescribed by law."
(Emphasis added)

Further, Section 21 of Article III of the Constitution provides:

Commissioner James F. Mauze

"The style of the laws of this state shall be: 'Be it enacted by the General Assembly of the State of Missouri, as follows.' No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose. Bills may originate in either house and may be amended or rejected by the other. Every bill shall be read by title on three different days in each house."
(Emphasis added)

Thus, in our view, there can be no doubt that an executive order is not a "law". State ex rel. McKittrick v. Missouri Public Service Commission, 175 S.W.2d 857, 861 (Mo. Banc 1943). Cf., State v. Atterbury, 300 S.W.2d 806 (Mo. Banc 1957).

We note that the executive order does not purport to be a "reorganization plan" within the provisions of Sections 26.500, RSMo et seq., which require submission of such a plan to the legislature.

In addition, a review of approximately two hundred pages of the debates of the 1944 Constitutional Convention of Missouri indicates the considerable attention given by the Convention delegates to the drafting of Section 19, Article IV and leads us to conclude that the intent was that the legislature is the only body considered to have the authority to bring "other state employees" within the merit system. (See for example, pages 4397 and 7276, second typing, Constitutional Debates).

Finally, our examination of the statutes and other constitutional provisions does not reveal any express authority for such an executive order and we do not believe that such authority can be implied. While the supreme executive power is vested in the Governor, Section 1, Article IV, Missouri Constitution, he is nevertheless still a mere executive officer and his general authority is narrowly limited. Section 1, Article II, Missouri Constitution; 38 Am.Jur.2d, Governor, §4.

It is clear that the legislature has neither directly nor indirectly authorized the Public Service Commission to be under the merit system.

We are aware that over the past decade there have been several executive orders purporting to place various state agencies under a merit system. We wish to make it clear that the validity of such executive orders, most of which are involved in the area of federal-state cooperation, is not determined here.

Commissioner James F. Mauze

CONCLUSION

It is the opinion of this office that the Governor's Executive Order dated May 2, 1972, purporting to place certain employees of the Missouri Public Service Commission under the provisions of Chapter 36, the state merit system, is invalid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

December 22, 1972

OPINION LETTER 304

Answered by Klaffenbach

Honorable Frank L. Mickelson
State Representative
Freeman, Missouri 64746

Dear Representative Michelson:

This opinion is in response to your question asking:

"Will the present Cass County Treasurer, who was re-elected on November 7, 1972, take office as County Treasurer on January 1, 1973 or on April 1, 1973?"

You further state that:

"Cass County is presently a third class county with Township Form of government. On January 1, 1973, it will become a Second Class county.

The present County Treasurer was elected in November, 1968, and took office on April 1, 1969. His present term expires April 1, 1973. But on January 1, 1973, Cass county will become a Second Class County."

In our Opinion No. 17, dated Febraury 15, 1972 to Whitcraft, copy enclosed, we held that when a third class county becomes a second class county, pursuant to Chapter 48, RSMo, the alternative form of government, i.e., township organization, ceases to exist.

Section 54.010, RSMo provides:

- "1. There is created in all the counties of this state the office of county treasurer.
2. In counties of classes one and two the qualified electors shall elect a county

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Honorable Frank L. Mickelson

treasurer at the general election in 1956 and every four years thereafter.

3. In counties of classes three and four the qualified electors shall elect a county treasurer at the general election in the year 1954, and every four years thereafter, except that in those counties having adopted the township alternative form of county government the qualified electors shall elect a county treasurer at the November election in 1956, and every four years thereafter."


Section 54.030, RSMo provides:

"The county treasurer so elected shall be commissioned by the county court of his county, shall enter upon the discharge of the duties of his office on the first day of January following his election, and shall hold his office for a term of four years and until his successor is elected and qualified unless sooner removed from office. In counties which have adopted the township alternative form of county government the treasurer's term shall extend until the first day of April next after the election of his successor."

The theory which we followed in our Opinions No. 89, dated February 18, 1954 to Toberman and No. 82, dated May 31, 1956 to Simrall, copies enclosed, is in our view applicable in this instance and as a consequence the term of the incumbent does not expire until April 1, 1973 which was the date fixed by Section 54.030 for the expiration of the term of the treasurer at the time of his election under the township alternative form of county government.

Therefore the County Treasurer-elect will take office on April 1, 1973.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 17
2-15-72, Whitcraft

Op. No. 89
2-18-54, Toberman

Op. No. 82
5-31-56, Simrall, Jr.

STATE EMPLOYEES:
RETIREMENT:
PENSIONS:

An employee of the State of Missouri who terminated such employment on July 31, 1957, then returned to employment by the state on January 13, 1969, who has since continuously remained in such employment, is not entitled to prior service credit for his state employment prior to July 31, 1957.

OPINION NO. 305

December 13, 1972

Mr. Edwin M. Bode, Secretary
Missouri State Employees'
Retirement System
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Bode:

This is to acknowledge receipt of your request for an opinion from this office which reads in part as follows:

"Whether an employee of the State of Missouri who terminated such employment on July 31, 1957, then returned to employment by the state on January 13, 1969, and has remained in such employment continuously since, is entitled to prior service credit for his state employment prior to July 31, 1957, as a result of the enactment of S.B. 548, 76th General Assembly."

In your opinion request, it is also indicated that Missouri state payroll records reveal that the employee in question worked for the state continuously from April 2, 1941, to July 31, 1957, when he terminated that employment; that he returned to work for the state on January 13, 1969, and has been so employed continuously to the present.

The Missouri State Employees' Retirement System became effective August 29, 1957, under an Act of the 69th General Assembly. See Laws of Missouri, 1957, pages 707-718, and 880. At this time, subsection 1 of Section 104.340, RSMo, provided as follows:

"Any member of the system, on the first day of the first month following the effective

Mr. Edwin M. Bode

date of this act shall be given credit for prior service with the state. All such service must be established to the satisfaction of the board."

Thus under the above statute, any employee who became a member on September 1, 1957, was entitled to credit for all service rendered prior to that date in any department, division or agency to which the system was applicable; provided that such service was established to the satisfaction of the board of trustees.

In 1959, House Bill No. 283 was passed by the 70th General Assembly and enacted into law. Laws of Missouri 1959. This was an Act to repeal Section 104.340, RSMo Supp. 1957 relating to credit for prior service granted members of the Missouri State Employees' Retirement System, and to enact in lieu thereof a new section relating to the same subject. Specifically, subsection 1 of Section 104.340, RSMo, provided as follows:

"Any member of the system, on the first day of the first month following the effective date of sections 104.310 to 104.550, shall be given credit for prior service with the state. All such service must be established to the satisfaction of the board."
(Emphasis ours)

Thus under the above statute, the words "sections 104.310 to 104.550" were substituted for the words "this act." In this regard, Sections 104.310 to 104.550, RSMo were then, and still are, the statutory provisions dealing with the Retirement System. The only other change made by the legislature at this time was the addition of the words "or who became an employee of the Missouri state employment service during the period of federal control" in subsection 3 of the statute. There was no other legislation affecting Section 104.340, RSMo, until Senate Bill No. 548 was passed by the 76th General Assembly and which became effective on August 13, 1972.

Senate Bill No. 548 was an Act to repeal various sections relating to the Missouri State Employees' Retirement System, and to enact in lieu thereof sixteen new sections relating to the same subject. Section 104.340, RSMo 1969, was one of the sections repealed. However, subsection 1 of Section 104.340 as set forth in Senate Bill No. 548, provides as follows:

"Any member of the system, on the first day of the first month following the effective date of sections 104.310 to 104.550, shall

Mr. Edwin M. Bode

be given credit for prior service with the state. All such service must be established to the satisfaction of the board."

Consequently, under the above statutory provisions, there were no changes in the language used by the General Assembly in subsection 1 of Section 104.340, RSMo. Instead, the legislature provided for a new paragraph 6 relating to employees of the Malcolm Bliss Mental Health Center.

In the factual situation that has been presented, it is indicated that the employee in question terminated his employment with the state on July 31, 1957. Under such circumstances it would be our view that the employee in question would not be entitled to receive prior service credit under subsection 1 of Section 104.340 when the Missouri State Employees' Retirement System was established for the reason that the individual was not employed by the state nor a member of the Retirement System on September 1, 1957. It is also our view that the repeal of subsection 1 of Section 104.340, RSMo by House Bill No. 283 in 1959 and the repeal of this section again in 1972 by Senate Bill No. 548 does not give the employee in question any new rights as to prior service credit. As previously noted, the only change in subsection 1 of Section 104.340, RSMo by House Bill No. 283 in 1959 was to substitute the words "sections 104.310 to 104.550" for the words "this act." In this regard, Sections 104.310 to 104.550, RSMo were then, and still are, the statutory provisions dealing with the Retirement System. In addition, there were no changes in the language of subsection 1 of Section 104.340, RSMo as a result of the passage of Senate Bill No. 548 in 1972. In this connection, Section 1.120, RSMo 1969 reads as follows:

"The provisions of any law or statute which is reenacted, amended or revised, so far as they are the same as those of a prior law, shall be construed as a continuation of such law and not as a new enactment."

Also, in the case of State ex rel. Klein v. Hughes, 173 S.W. 2d 877 (Mo. 1943), it was pointed out that the general rule is that when part of a statute is repealed by an amendatory act, the provisions retained are regarded as a continuation of the former law, whereas those omitted are treated as repealed. The presumption is that the legislature intended the unamended part of a statute to remain operative and effective as before. Consequently, it is our view that there have been no legislative changes in subsection 1 of Section 104.310, RSMo to indicate that the employee in question is entitled to prior service credit.

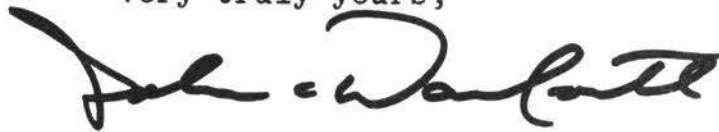
Mr. Edwin M. Bode

CONCLUSION

It is therefore our opinion that an employee of the State of Missouri who terminated such employment on July 31, 1957, then returned to employment by the state on January 13, 1969, who has since continuously remained in such employment, is not entitled to prior service credit for his state employment prior to July 31, 1957.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

COUNTIES:

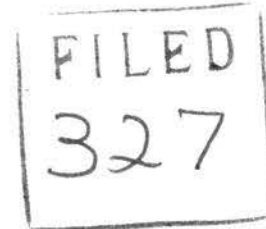
COUNTY CLASSIFICATION:

A third class county which had an assessed valuation of more than \$70,000,000 and less than \$300,000,000, as determined by the State Tax Commission for the years 1967, 1968, 1969, 1970 and 1971, will become a second class county on January 1, 1973.

OPINION NO. 327

December 29, 1972

Honorable Christopher S. Bond
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Bond:

This is in response to your request for an opinion from this office in part as follows:

"On January 19, 1972, the Missouri State Tax Commission notified the State Auditor by letter (copy attached hereto) that the assessed valuation of Cass County for the year 1971 was \$83,404,676.

"Since the State Tax Commission had previously determined that the assessed valuation of Cass County exceeded \$70,000,000 for the years 1967 through 1970, inclusive, the year 1971 was the fifth successive year Cass County had an assessed valuation exceeding \$70,000,000.

"Pursuant to notification by the State Tax Commission of the 1971 assessed valuation of Cass County, the State Auditor, on February 17, 1972, notified officers of Cass County of a change in classification from third to second class status, effective January 1, 1973, as required by Chapter 48, RSMo 1969.

"In the aforementioned letter of January 19, 1972, the State Tax Commission stated the valuation of Cass County, and other counties, 'as determined by this Commission as of December 31, 1971 for the year 1971.'

Honorable Christopher S. Bond

"The question has arisen whether the 'date of the certification' by the State Tax Commission to the State Auditor was December 31, 1971, or January 19, 1972. This date, of course, would determine whether the change of classification of Cass County from third to second class would be effective January 1, 1973, or January 1, 1975.

"We ask for your interpretation of Section 48.030 to determine the effective date of the change of classification of Cass County from third to second class."

Section 48.030 (Senate Bill No. 271, 76th General Assembly, Second Regular Session), provides as follows:

"No county shall move from a lower class to a higher class or from a higher class to a lower class until the assessed valuation of the county is such as to place it in the other class for five successive years; except that, a county of the second class may become a county of the first class if the assessed valuation of the county is such to place it in the first class for three successive years. The change from one classification to another shall become effective at the beginning of the county fiscal year following the next general election after the certification by the state equalizing agency for the required number of successive years that the county possesses an assessed valuation placing it in another class. If a general election is held between the date of the certification and the end of the current fiscal year, the change of classification shall not become effective until the beginning of the county fiscal year following the next succeeding general election."

Section 48.040, RSMo, provides as follows:

"It shall be the duty of the state auditor, as the supervisor of county audits, to examine annually the assessed valuation figures of the various counties immediately upon the

certification of same by the state equalizing agency and to ascertain if any county shall have changed classifications as determined in this chapter. In case it shall be found that any county has met the requirements of reclassification as set forth in this chapter, it shall be the duty of the state auditor within thirty days after said certification to notify officially all county elected officers and the county officials charged with the supervision of elections of the change in status of the county."

You state that the State Tax Commission had previously determined the assessed valuation of Cass County exceeded seventy million dollars and was less than three hundred million dollars for the years 1967 through 1970 inclusive and that the year 1971 was the fifth successive year Cass County had an assessed valuation exceeding seventy million dollars and less than three hundred million dollars which under Section 48.020, RSMo, qualified it to become a second class county.

You further state that on January 19, 1972, the State Tax Commission notified the State Auditor that Cass County had a valuation ". . . as determined by this Commission as of December 31, 1971 for the year 1971." The determination of such assessed valuation of property in the county was contained in the annual report of the State Tax Commission provided for in Section 138.440, RSMo. You inquire as to the "date of certification" by the State Tax Commission as such phrase is used in Section 48.030, RSMo.

Section 50.010, RSMo, provides as follows:

"Unless otherwise provided in a charter adopted by a county under the provisions of sections 18 or 31, 32 and 33 of article VI, of the constitution of this state, the fiscal year of the several counties of the state shall commence on January first and terminate on the thirty-first day of December in each year, and the books, accounts and reports of all county officers shall be made to conform thereto."

Honorable Christopher S. Bond

It is our view that under Section 48.030, supra, the "certification" required is the certification of the total assessed valuation for the year in which the determination is made by the state equalizing agency. The "certification" as such word is used in Section 48.030, RSMo, in our opinion, is the State Tax Commission report made pursuant to Section 138.440. The change in classification of such a county is not dependent on the transmission of information as to assessed valuation by the State Tax Commission to the State Auditor or by the State Auditor to county officials. See Opinion No. 72, dated November 22, 1954 to Stephen R. Pratt, attached.

If the State Tax Commission had not on January 19, 1972, or any other date, given information to the State Auditor as to the assessed valuation of Cass County the change of classification would nevertheless take place by operation of law.

If the State Auditor had not on February 17, 1972, or any other date, notified the county officials of Cass County that 1971 was the fifth successive year that Cass County had an assessed valuation of more than \$70,000,000 and less than \$300,000,000, the change of classification would nevertheless take place by operation of law.


It follows that the certification in the premises was as of December 31, 1971 and therefore Cass County will become a second class county January 1, 1973.

CONCLUSION

It is the opinion of this office that a third class county which had an assessed valuation of more than \$70,000,000 and less than \$300,000,000, as determined by the State Tax Commission for the years 1967, 1968, 1969, 1970 and 1971, will become a second class county on January 1, 1973.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Very truly yours



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 72
11/22/54, Pratt

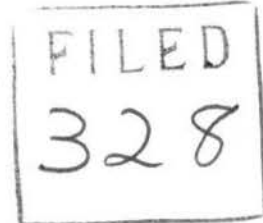
LIQUOR:
SUNDAY SALES:

Section 311.298, RSMo 1969, applies to establishments licensed to sell 5 percent beer by the drink and such establishments can sell 5 percent beer by the drink on Sunday when December 31 falls on Sunday after 1:00 p.m. and until the time which would be lawful on another day of the week.

OPINION NO. 328

December 22, 1972

The Honorable Clinton D. Summers
Prosecuting Attorney
Butler County
Courthouse
Poplar Bluff, Missouri 63901



Dear Mr. Summers:

This opinion is in response to your request for an opinion as to whether or not Section 311.298, RSMo 1969, applies to an individual who possesses a license to sell 5 percent beer only.

Section 311.298 provides:

"When December thirty-first falls on Sunday, any person having a license to sell intoxicating liquor by the drink may be open for business and sell intoxicating liquor by the drink under the provisions of his license on that day after 1:00 p.m. and until the time which would be lawful on another day of the week, notwithstanding any provisions of section 311.290 or any other provision of law to the contrary."

The question then is whether a license to sell 5 percent beer by the drink is a license to sell "intoxicating liquor by the drink". "Intoxicating liquor" is defined in Section 311.020, RSMo 1969, as any type of alcohol for beverage purposes, and all preparation or mixtures for beverage purposes, containing in excess of 3.2 percent of alcohol by weight. Licensing provisions exist for the sale of all kinds of intoxicating liquor by the drink and also for the sale of 5 percent beer (malt liquor containing alcohol in excess of 3.2 percent alcohol by weight but not in excess of 5 percent by weight) by the drink only. The 5 percent beer license by the drink is authorized by Section 311.200, Sub. 3; a license for

the sale of all kinds of intoxicating liquors by the drink is authorized by Section 311.200, Sub. 4.

Section 311.100, RSMo 1969, specifies that the sale of any intoxicating liquor other than malt liquor in an original package containing less than one-half pint shall be deemed a "sale by the drink". With respect to 5 percent beer, Section 311.200, Sub. 2, RSMo 1969, distinguishes a sale in original package as opposed to a sale by the drink by construing the phrase "original package" as a sale of any package containing three or more standard bottles of beer.

In our opinion, the phrase "licensed to sell intoxicating liquor by the drink" as used in Section 311.298 does not refer only to those licenses allowing the sale of all kinds of intoxicating liquor by the drink. As shown by the statutory sections cited above, the Missouri Liquor Control Law provides for two types of licenses for the sale of liquor by the drink, one allowing the sale of 5 percent beer only (malt liquor) and the other for the sale of all types of intoxicating liquors. As shown by the provisions of Sections 311.090 and 311.110, the legislature is capable of distinguishing between these two types of licenses in situations deemed desirable or necessary. Since 5 percent beer is intoxicating liquor as that term is defined by Section 311.020, this leads to the inescapable conclusion that Section 311.298 applies to all establishments licensed to sell intoxicating liquors of any type by the drink.

CONCLUSION

It is the opinion of this office that Section 311.298, RSMo 1969, applies to establishments licensed to sell 5 percent beer by the drink and such establishments can sell 5 percent beer by the drink on Sunday when December 31 falls on Sunday after 1:00 p.m. and until the time which would be lawful on another day of the week.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard Wieler.

Yours very truly,



JOHN C. DANFORTH
Attorney General